84-269

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

EDWARD J. BLOOM,
Petitioner,

v.

UNITED STATES OF AMERICA,

ON WRIT OF CERTIORARI
TO THE FIFTH CIRCUIT
COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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12/1/20

QUESTIONS PRESENTED

1. Whether petitioner's Fifth & Sixth Amendment rights were violated because, after demand, he was denied complete grand jury transcripts of witnesses but instead was given excised copies ommitting testimony germane to the case against petitioner.

2. Whether petitioner's Fifth Amendment rights were violated by his waiver of jury trial, which waiver was induced by representations made by the prosecution and the trial court that petitioner had been furnished with all relevant grand jury transcripts, which representations were erroneous.

3. Whether the denial to petitioner of access to record on appeal to the Fifth Circuit Court of Appeals of co-defendant (who was tried separately)

to be used in aid of petitioner's appeal to the Fifth Circuit Court of Appeals denied petitioner due process, equal protection and a fair hearing on appeal.

4. Whether the trial court's rulings and the admission of hearsay evidence relating to petitioner's good faith defense under the Classified Informations Procedures Act violated petitioner's Fifth and Sixth Amendment rights.

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IN THE
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NO.

EDWARD JOHN BLOOM,
Petitioner

v.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

EDWARD JOHN BLOOM PETITIONS FOR A WRIT OF CERTORIARI TO REVIEW THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINION BELOW

The Opinion of the Court of Appeals (App. A infra) is referred to in United States v. Bloom, 732 F. 2d. 939 under the Caption of "Decisions without published opinions". The judgment and committment of this trial court was entered June 15, 1983. (App. A-2).

JURISDICTION

The judgment of the Court of Appeals (App. A., infra) was entered on April 19, 1983. A petition for rehearing was denied on May 21, 1984. (App. B, infra) On July 5, 1984, the Honorable Justice White extended the time within which to file a petition for a Writ of Certiorori to and including August 19, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATEMENT

Petitioner, Edwin Wilson and Donald Thresher were indicted in the United States District Court, Southern District of Texas, for conspiracy to make an illegal shipment of C-4 explosive from Houston, Texas, to Libya in October 1977. Thresher pleaded guilty to a misdemeanor charge. Petitioner and Wilson were joint defendants until the date set for trial, at which time they

were severed. The trial of Wilson proceeded before a jury, which convicted him. Thereafter petitioner was tried by the Court without a jury, and petitioner was found guilty. The judgment of committment appears on Appendix A-2.

Petitioner was sentenced to imprisonment for two years which was suspended and petitioner was placed on supervised probation for 5 years on conditions, one of which was that petitioner spend not more than 120 days in a half-way house. Petitioner has performed this condition. Although petitioner has served this sentence, it has been held that the possibility of consequences collateral to imposition of sentence may be of sufficient importance to justify the Supreme Court in dealing with the merits of the matter (Pollard v. United States, 352 U.S. 354,

357, 1957).

The indictment contains four counts. Count one charges the conspiracy, 18 U.S.C. 371. Count two charges the presentation of a falsified shipper's Export Declaration which listed the explosives as drilling mud, 18 U.S.C. Secs. 2 and 1001. Count three charges the export of C-4 without obtaining the required licenses from the State Department in violation of 22 U.S. Sec. 2778 (c), 18 U.S.C. Sec. 2, and Title 22 C.F.R. Sections 121.01 (Category 5) 121.11 and 123.01. Count four chartes the illegal transportation of hazardous material by cargo aircraft, in violation of 49 U.S.C. Sec. 1809(b), 18 U.S.C. Sec. 2 and 49 C.F.R. Secs. 172, 100, 172 101. C-4 is sometimes referred to by the name of its principal component (RDX) and by its full name, Cyclo

trimethylene.

Petitioner is a lawyer, 76 years of age. He is married and has two daughters. Petitioner went to Gonzaga University, University of Washington School of Mining and Engineering and also attended Princeton University. He served 39 months overseas as a Naval Officer in the Second World War. Prior to the occurrences charged in the Indictment, Petitioner had been admitted to practise law in the States of Idaho, Washington and California and had never been disciplined by the Bar in any of these States.

Jerome S. Brower, Edwin H. Frazier and Reginald Slocombe were named in the Indictment as "Undicted Co-Conspirators". Brower pleaded guilty in the United States District Court for the District of Columbia, Case No. 80-200 to conspiracy

to violate the Munitions Control Act, 18 U.S.C. 844 (d) and Treasury Regulations, 49 U.S.C. 1809 (b) CTR 172. One of the Counts against Brower in the case was for perjury before the grand jury, which perjury is hereafter mentioned. Slocombe and Frazier also pleaded guilty to charges related to export of explosives to Lybia. Brower, Frazier and Slocombe each agreed with the Government to testify truthfully, if called upon to do so.

The principal Government witness against Petitioner was Brower. Petitioner's involvement with Brower follows:

Petitioner testified that he was attorney for Brower and his corporations from about 1971 to 1982; that appellant was paid a retainer of $ 100.00 per month; that during this period, appellant spent approximately 100 days on Brower's work,

and that he had limited social contacts with Mr. Brower. Petitioner further testified that this legal work consisted mainly of making collections in the United States and Europe, formation of corporations, a limited amount of litigation, attending conferences or conventions in the U.S. and Europe on subjects of interest to Brower, and problems involving leases on real property. Petitioner never had daily, weekly or monthly briefings of Brower's business activities and only did a specific job for Brower when he requested it. Also, Petitioner, as attorney, took Brower to the Grand Jury in Washington, D.C., when it was, unknown to appellant, investigating shipment of explosives to Libya. Brower told Bloom that he "didn't have the slightest idea what the thing was all about". Bloom advised him to come clean

- to tell the truth or keep his mouth shut.

Brower testified that he had sold explosives to the Libyans in 1976. This transaction did not involve Petitioner and Brower testified that he did not think Bloom had any knowledge of such 1976 transactions. Additionally, Brower testified that he had been in the business of manufacturing, buying, selling, and shipping explosives all over the world. In addition to selling explosives, Brower sold other chemicals as indicated by pages from his business catalogue introduced as defendant's Exhibits 27 and 30.

In the spring of 1977, Wilson introduced Brower, the President of an explosives company in Pomona, California, (which company had an explosives magazine at Fontana, California) to a group of Libyans who were interested in purchasing

some C-4 explosives. At this meeting, held in Washington, D.C., Brower spoke to a Libyan called Algaidy (or Al Guydi).

A contract was entered into for the sale of C-4 by Brower's company, Explosives International Engineering Contractors, to Mepreco. Brower received $588,000 for the sale of the explosives by payment made to an account of Brower's in a Switzerland Bank.

In order to fulfill the order for C-4, Brower, who had a small amount of it in his inventory, made purchases from three sources (Canadian Industries Limited (C.I.L.) in Canada, Technial Explosives and Goex in the United States).

Petitioner, at Brower's request and with cash money provided by Brower, paid for some of the C-4 purchased by Brower.

Petitioner did not know at the time

of these payments that the C-4 would ultimately be shipped over seas.

These purchases of C-4 were, as Petitioner knew, each and all perfectly legal for Brower had a numbered license from the United States allowing importation, exportation, manufacture, purchase, and sale of explosives. These payments have nothing to do with conspiracy to make a forbidden export shipment unless the government couples them with evidence of petitioner's specific intent to violate the law, which it did not do.

Brower admitted that it was his idea as to where the C-4 would be purchased; that he made all arrangements for the purchase and payment by this corporation, J. S. Brower & Associates; that he arranged for and paid for the explosives to be brought to his place in California and

from there to Houston.

After the purchased C-4 arrived at Brower's magazine in California, Brower and his men put the C-4, which arrived in plastic lined fiberboard boxes, in cans with a "drilling mud overlay" over the C-4 in each can to mask or cover the explosive, and then sealed the can.

Brower requested Bloom to prepare a draft Invoice for export of chemicals sold by his company. Brower admitted giving Bloom all of the terms and details on this invoice including description of the goods as chemicals, price and quantity etc. It never entered petitioner's mind that this invoice had anything to do with C-4 or export of it.

Thereafter Brower prepared an invoice from the draft made by petitioner changing the description of goods sold to C-4.

The seller was Explosives Engineering, Brower's Lichtenstein Corporation, and the buyer was Consultant's International. Brower took the Invoice to Libya. Bloom never saw the invoice prepared by Brower which invoice in the main was copied from the draft, except it substituted "drilling mud" for "chemicals" according to Browers testimony. No testimony exists that petitioner ever saw or knew of the invoice prepared by Brower.

Finally, Brower had the C-4 in his magazine packaged in cans and labeled as stated above and it was time to ship same to Houston. Brower told Bloom that he thought he could save some money if he could locate a Texas trucker in California going back to Texas. Bloom asked a client of his knowledgeable in trucking and he referred Bloom to a truck stop. Bloom went

there and located a Texas gypsy trucker and told him that an outfit wants some cargo taken to Houston, gave him Browers card and asked him to call Brower. That was Bloom's only connection with the shipment to Houston.

Brower had a label made to put on the cans. He discussed it with petitioner who suggested that he put "explosives" on it and Brower testified "I was not going to do that in any way, shape or form". However, he did not tell petitioner he was not putting the word "explosives" on the labels but told petitioner that he would have the printer overlay the already printed labels with correct description. Petitioner assumed that Brower had re-run the labels to insert "explosives". Brower designed the labels and it was his idea to put drilling mud on the labels;

he testified that he knew that if the label said "drilling mud", the liklihood is that the (export) declaration would show drilling mud. Brower selected Houston as the port from which to ship the C-4 to Libya.

Unknown to petitioner, Brower got a phone call from a person Brower subsequently said was Wilson's man saying Wilson had not provided the money for hiring an airplane to transport the C-4 to Libya and Brower replied that he would see what he could do. Brower personally advanced $ 82,000 as a loan to Wilson to pay for the airplane, which loan was repaid by Wilson.

On or about Sept. 29, 1977, Brower handed Bloom about $ 79,000 in cash and told him to take the money to Houston and see that it paid for the airplane shipment

to Libya, ride the plane from Houston to Lisbon and that Brower would join the plane in Lisbon where Bloom would get off and Brower would ride the plane from Lisbon to Libya. Brower said that all documents were in order.

Petitioner testified that at the time Brower gave him the money to take to Houston petitioner told Brower that he could not ship explosives in an airplane. Brower then gave petitioner a silver medallion or coin and said it was a National Security Council operation and that the medallion was a National Security identification piece; and if any official stopped petitioner, to show the medallion and the official would go away. From that point on, petitioner believed the C-4 shipment was an operation of the National Security Council or its agents and that it

was his patrotic duty to carry out Brower's instructions.

Up to the time that Brower gave petitioner the medallion all of petitioner's actions in connection with the purchases and shipment of C-4 to Brower's plant and the re-shipment to Houston on or about Sept. 28, 1977, were legal and appellant had no knowledte of what was going on.

At the time of the shipment of C-4 to Houston and then to Libya, petitioner had known Brower for 7 or 8 years during which petitioner was attorney for Brower. Petitioner thoroughly believed in Brower's honesty and integrity and had no reason to disbelieve Brower when he gave petitioner the medallion and said it was a National Security Council identification piece. Petitioner testified that his opinion of Brower was based upon Brower's history as

a member of the American Institute of Mining Engineers, member of Board of Directors of Society of Explosive Engineers, former commanding officer of Dugway Proving Grounds in Utah, former dedicated officer of the United States Army, a man active in promoting youth activites, co-inventor of the fuel which sent the rocket to the Moon and a marriage of long stability. From his personal contacts with Brower, petitioner firmly believed him to be honest, truthful, devoted to his country, patriotic, trustworthy, and a man of great integrity and petitioner thoroughly relied upon and believed what Brower told him.

When petitioner learned that explosives were being shipped to Libya, he told Brower that he would have to get a State Department permit and petitioner offered to fly to Washington to get it.

Brower said it was not necessary and that Wilson's people were taking care of that and petitioner believed that the export permit had been obtained.

Petitioner took the cash to Houston where he was informed that it was necessary to Miami to pay for the plane. Petitioner, Thresher, Slocombe and Frazier (all identified to petitioner as "Wilson's people") flew to Miami and Thresher on behalf of Shay Company (freight forwarder) signed airplane lease agreement and arranged for a flight crew and petitioner, with Brower's money, made the necessary payment for plane and crew. Petitioner, Slocombe, Frazier, and Thresher returned to Houston.

The plane arrived in Houston, was loaded and ready to depart. Petitioner, the Captain, Thresher and Slocombe were

standing around and petitioner asked if Customs Clearance had been obtained. They said no, they were going after it now and that petitioner should keep an eye on the airplane. They returned and petitioner asked if the papers are in order and they replied yes. The crew and petitioner got in the plane and it took off for Libya. When petitioner boarded the plane, he believed everything was in order and perfectly legal.

The plane landed in Lisbon to re-fuel and petitioner phoned Brower at a hotel where he said he would be. Brower came to the plane and Brower and petitioner rode the plane to Libya. Upon landing Brower disappeared. A Libyan drove petitioner to an hotel and at dinner in the hotel dining room petitioner, by chance, met Wilson. This was the first

petitioner had ever met Wilson. At dinner they discussed no business of any kind. The next morning, a Libyan drove petitioner to Wilson's office. Petitioner sat in the waiting room about 2 hours and he could see Wilson and Brower talking in another office. Finally Brower came out and handed petitioner an airplane ticket to Zurich. Petitioner then left Libya and returned to the United States.

There is no evidence in the record that petitioner was promised or expected any money or any other consideration for his aforesaid acts, which he performed at Brewers request, except payment of his retainer of $ 100 per month.

Brower testified: (1) that Bloom did not know the C-4 shipment was disguised as drilling mud; (2) that before the shipment to Houston Brower told

petitioner that Wilson or Consultants International would obtain the export permit; (3) that Brower's original obligation was to ship the C-4 to Houston and then Wilson's people would take over; (4) that Bloom had no knowledge of what was going on up to the time of the shipment to Houston or a day or two prior to the shipment to Houston; (5) that Brower was not in the habit of telling petitioner the details of his business, but only told petitioner what was necessary for him to know to do a particular job and petitioner did not need to know the origin of a transaction; (6) Brower admitted that he enforced the need to know principle within his own organization; (7) petitioner never had daily, weekly, or monthly briefing of Browers activities; (8) that there was no reason to tell Bloom that

Brower was in a clandestine operation before giving Bloom the money to pay for the airplane; (9) that Bloom never met Wilson before the plane arrived in Libya; (10) that Bloom did not need to know that the cans contained explosives before they were loaded on the truck for shipment to Texas; and (11) Bloom had no part in Browers 1976 terriorists activities, which are hereafter mentioned.

Browers passion for secrecy was substantiated by his employee of 25 years, (Doug Smith) who testified that nobody in the organization knew what Jerome Brower was doing. Brower's wife (Peggy) and son Paul testified that in 1977 they had no knowledge of what Brower was doing with either Wilson, Consultants International or Libya.

REASONS FOR GRANTING THE PETITION

I

PETITIONER WAS DENIED A FAIR TRIAL BECAUSE THE EXCISED COPIES OF GRAND JURY TESTIMONY GIVEN TO PETITIONER DELETED MANY, MANY PORTIONS MATERIAL TO THE CHARGES AGAINST PETITIONER IN VIOLATION OF HIS RIGHTS UNDER THE SIXTH AMENDMENT TO CONFRONTATION AND CROSS-EXAMINATION AND VIOLATED HIS RIGHT UNDER THE FIFTH AMENDMENT TO DUE PROCESS.

Petitioner had moved the Trial Court for an order requiring the Government to give petitioner copies of grand jury transcripts of all witnesses to testify against him at trial. Pursuant to this

request the court ordered the Government to give petitioner copies of all such grand jury transcripts before trial so as to avoid delays in trial which would result if the copies were withheld until after each such witnesses testified for the prosecution.

Pursuant to this order, the prosecution gave petitioner redacted copies of the grand jury transcripts, which redacted copies were approved by the trial judge, who said:

> "I have read as was necessary the entire grand jury testimony of witnesses who did appear here at trial, and in which they testified about matters that were not relevant to the case here."

On November 22, 1982, when the trial judge ordered the prosecution to furnish the excised copies of grand jury transcripts to petitioner, he stated that the

deleted portions had nothing to do with "this case". He then stated: "If there is anything that comes out during the testimony where they go beyond that, then certainly I will see that you (referring to defendants) get the other testimony on the grand jury. If it is material and if it comes out, you will be given an opportunity to make use of it".

In appearances before the grand jury in Washington, D.C. in 1979 and 1980 and in Texas in 1982, witness Brower told completely different stories as did his employee Smith in appearances before the grand jury in Washington, D.C. in 1979, 1980 and in Texas in 1982. Both of them in their later appearances before the grand jury, after making a deal with the Government and agreeing to testify truth-

fully, recanted much of their prior testimony to the grand jury and testified that the 1976 Brower shipment of C-4 to Libya was used by them to teach the Libyans how to make terriorists devices such as letter bombs, lamps which would explode when the cord was pulled, gift jars of tea, which would explode when opened; fire extinguishers which would explode when taken off the wall; and brief cases which would explode when a timing device went off.

In their latest appearances before the grand jury Brower and Smith also testified concerning teaching the Libyans how to engineer violations of customs, conspiracy, solicitation of murder and other terrible endeavors and terrorists devices.

The grand jury testimony referred to in the preceeding paragraph was deleted from the redacted copies furnished to petitioner.

Also deleted from the redacted copies given to petitioner were matters pertaining to the 1977 shipment of which petitioner is charged with conspiracy and other charges. For example, in the redacted copy of Smith's testimony before the grand jury there is omitted Smith's question to Brower relating to the 1977 C-4 shipment involved in this case if the purchasers had obtained the necessary permits and Brower replied "They are working on it right now". Whereas Brower had represented to petitioner that such permits had been obtained.

Brower's wife Peggy testified at petitioner's trial that she had no know-

ledge of Brower's activities with the Libyans.

After his trial and conviction, petitioner for the first time in aid of his appeal saw the complete unredacted grand jury transcripts of the witnesses. When he compared his redacted copies with the full and complete transcripts, it appeared that the excised copies contained hundreds of blank pages.

The deleted portions of the transcripts not furnished petitioner contained superb material matters for cross-examining those witnesses and impeaching them. If petitioner had known of the existence of this testimony, deleted from his redacted copies, he could have shown beyond doubt on cross-examination that the witnesses lied to the grand juries about matters relevant to the case against

petitioner, and could have completely destroyed their credibility.

In Jencks v. United States 353 U.S. 657 (1957) the court said at page 671 quoting from United States v. Reynolds, 345 U.S. 1 at page 12, that in criminal cases:

> " '...the Government can invoke its evidentiary privileges only at the price of letting the defendant go free. The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything that might be material to his defense...' "

In Faretta v. California 422, U.S. 806 (1974) it is said at page 839:

> "...the prosecution is more than an ordinary litigant, and the trial judge is not simply an automation who insures that technical rules are adhered to. Both are charged with the duty of insuring that justice, in the broadest sense of that term, is achieved in every

criminal trial."
(Citations omitted)

In Brady v. Maryland, 373 U.S. 83 (1963) this court said at pages 87-77:

> "...we now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the of the good faith or bad faith of the prosecution..."

The court has said that fairness of procedure is due process in the primary sense. (Brenkerhoff - Fairs Co. v. Hill 281 U.S. 673, 681 (1929); that the requirements of due process cannot be ascertained through mechanical application of a formula (Groppe v. Leslie, 404 U.S. 496, 500 (1972); and that due process has never been, and perhaps can never be, precisely defined (Lassiter v. Dept. of Social Services 452, U.S. 18, 24 (1980).

Since cross-examination is the greatest legal engine ever invented for dis-

covery of truth (Wigmore Sec. 1367 3rd ed. 1940), suppression by the prosecution, after demand, of material relevant for cross-examination purposes eviscerates such rights.

Since petitioner had no knowledge of what was contained in the excised portions of the grand jury transcripts, he was not able to make a showing to the trial court of "particularized need" for such deleted portions.

As this court stated in Dennis v. United States, 384 U.S. 855 (1966), 873-874:

> "A conspiracy carries with it the inevitable risk of wrongul attribution of responsibility to one or more of the multiple defendants ....Under these circumstances, it is especially important that the defense....shall have the assurance that the doors that may lead to truth are unlocked....For this reason we cannot accept the view of the Court of Appeals that is

> 'safe to assume' no inconsistencies would have come to light if the grand jury testimony had been examined. There is no justification for relying upon Assumption' ". (Citation and footnotes ommitted).

Suppression of the demanded material denied petitioner his Fifth Amendment rights to due process and a fair trial and his Sixth Amendment rights to confrontation and cross-examination because: (1) it is unconscionable to allow the government "to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything that might be material to his defense" (Jencks, supra); (2) both the trial judge and the prosecution "...are charged with the duty of insuring that justice, in the broadest sense of that term, is achieved in every criminal trial (Faretta, supra); (3) suppression of evidence which, if made available, would tend to exculpate the accused

violates due process (Brady, supra) and (4) fairness of procedure is the essence of due process (Brenkerhoff, supra).

A few illustrations of the testimony of Brower, his wife Peggy, (who was also his office manager) and of his employee Smith appear on Appendix D infra together with brief explanatory statements of the testimony.

While the prosecution did not call Peggy Brower and Smith as Witnesses, petitioner was foreclosed by the redacted transcripts from ascertaining many relevant facts with which to cross-examine Brower, Peggy Brower, Smith and other prosecution witnesses.

II

REPRESENTATIONS OF THE PROSECUTION AND THE TRIAL COURT THAT PETITIONER HAD BEEN FURNISHED ALL RELEVANT GRAND JURY TRANSCRIPTS, WHICH REPRESENTATIONS WERE ERRONEOUS, INDUCED PETITIONER TO WAIVE JURY AND THE WAIVER IS VITIATED BY THE ERRONEOUS REPRESENTATION

Shorlty before his trial was to commence, petitioner waived his right to a jury trial. He did this in the belief that the Court had ordered the Government, and that it had complied, to furnish to petitioner copies of all Grand Jury transcripts of witnesses material to petitioner's case. Petitioner received redacted copies and the excised portions related to atrocious terrorist activities on the part of Brower and others so revolting

and unhuman as to turn the stomach of the normal person. The deleted portions included many lies and changing of stories by witnesses Brower, Smith and perhaps others before different grand juries.

As stated above, the trial court had read all of this wicked testimony and approved deletion of it from the redacted copies supplied to petitioner. The prosecution did not inform petitioner of the existence of this deleted material or the nature of same.

While petitioner's waiver of jury trial complied on its face with Rules 23 (a) F.R.C.P., such waiver by petitioner was made in ignorance of the existence of the material delted from the grand jury transcripts, which deleted material, as stated above, offered many, many material opportunities for impeaching

adverse witnesses, destroying their credibility and pursuing truth. Such impeaching testimony would have been particularly effective before a jury. It is inconceivable that a juror would believe a word of the testimony of a witness such as Brower, admitting on the witness stand (as he had testified befor grand jury and the testimony withheld from petitioner) the dreadful terrorist activity which he participated in, originated and orchestrated.

By way of illustration, one of petitioner's defenses was a good faith belief that the shipment of C-4 to Libya was an operation of the National Security Council. This belief, as petitioner testified, was based on a medallion (coin) which Brower gave to petitioner at the time Brower asked petitioner to go to

Houston and pay for the airplane. At that time Brower told Bloom that the medallion was a National Security Identification Piece and that if any Government official got in the way to show him the medallion and the official would go away. From that point on petitioner believed that the C-4 shipment was a Government operation. In his testimony at petitioner's trial Brower denied telling petitioner that the medallion was a National Security Identification Piece, and explained it as an identification piece within his own organization. This claim was ridiculous as petitioner knew all of Brower's people.

Brower was the only witness, other than petitioner, to testify concerning the medallion. If petitioner had had the material excised from the grand jury transcripts available with which to cross-

examine and impeach Brower, he would have known that he could destroy completely Brower's credibility before a jury and petitioner would never have waived jury trial.

Petitioner asserts that his waiver of jury was predicated upon his false assumption that he had been furnished by the Government with all relevant information, which false assumption was induced by the Government and by the trial court in depriving petitioner of the deleted portions of Grand Jury transcripts. The Government withholding of the deleted material vitiates petitioners waiver of jury and resulted in the denial of a fair trial in that the waiver forclosed petitioner's opportunity to cross-examine the witnesses before a jury and to expose their various lies and changing of stories

under oath before different grand juries.

The trial court and the prosecutor were charged with the duty to supply the deleted grand jury testimony to petitioner. They failed in that duty but in the belief induced by them that they had performed this duty petitioner waived jury. Petitioner's waiver is nullified by nonperformance of this duty.

In a case involving waiver of counsel by a defendant in a criminal case, this court said in Johnson v. Zerbst, 304 U.S. 458 (1938) at page 464:

> "It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights'.
>
> A waiver is ordinarily and intentional relinquishment or abandonment of a known right or privilege."

And Adams v. United States ex rel.

McCann, supra, at p. 278 the court said that whether there has been a competent waiver of jury trial must depend upon "the unique circumstances surrounding each case".

In Schneckloth v. Bustamonte, 412 U.S. 218 (1972), the court referred to Johnson v. Zerbst, 304U.S.458, and said at page 237:

> "the court has applied the Johnson criteria to assess the effectiveness of a waiver of other tiral rights such as...a jury trial..." etc. (Footnotes ommitted).

As stated in Adams, supra, at page 279:

> He may waive his constitutional right...if he knows what he is doing and his choice is made with his eyes open." (Citation ommitted).

Another factor also vitiates petitioner's waiver of jury. The court read testimony of Brower and Smith in the portions of their testimony not supplied to petitioner which reading would create a feeling of utmost disgust and loathing against the persons involved, i.e. Brower.

In as much as petitioner had been associated with Brower, but had no knowledge of these frightful activities, he would never waive jury and consent to trial before a judge who had read same if petitioner had known of the existence of the facts contained in the excisims withheld from petitioner. If petitioner had known that this material existed he would have, besides savoring it for cross-examination before a jury, never consent to a trial before a judge (without jury) who had read this shocking testimony. In such event, if petitioner knew of the existence of this material and that the judge had read it, petitioner would assume that the judge would be very prejudiced against Brower and anyone connected with him. Although petitioner regards the trial judge as an excellent judge and a fine

gentlemen, petitioner cannot imagine any judge or person reading these terrible testimony (concealed from petitioner) without forming prejudices.

Much of the material excised from the copies of grand jury testimony furnished to petitioner but read by the trial judge could easily lead that judge to assume that petitioner was in a conspiracy with Brower.

POSSIBILITY OF UNFAIRNESS

IS A DENIAL OF DUE PROCESS

As stated in In re Murchison, 349 U.S. 133 (1955) at page 136:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But out system of law has always endeavored to prevent even the probability of unfairness." (Emphasis supplied).

In Tumey v. Ohio, 273 U.S. 510 (1927) the court said at page 532:

> "Every procedure which would offer a possible temptation to the average man...to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." (Emphasis supplied).

It is possible that the court's reading of the villainous material and lies in grand jury testimony denied to petitioner (which material was unknown to

petitioner at the time he waived jury or during his trial) influenced the court against petitioner or cause the court to be prejudiced against him.

Therefore the possibility exists that the court unconsciously could not "hold the balance nice, clear and true between" the Government and petitioner.

As the court said in Estes v. Texas, 381 U.S. 531 (1965) a case involving television of a notorious criminal trial:

> "....one cannot put his finger on its specific mischief and prove with particularity wherein he was prejudiced...such untoward circumstances....are inherently bad and prejudice will be presumed."
>
> (381 U.S. 544)

When petitioner waived jury he knew what he was doing in the sense that he knew the relative advantages and dis-

advantages of jury trial versus court trial. But petitioner's eyes were closed by the erroneous assertion of court and prosecution that all relevant information and grand jury transcripts had been furnished him, when such had not. Such concealment nullifies petitioner's waiver of jury and deprived petitioner of a fair trial and of due process under the Fifth Amendment.

In short, petitioner's waiver of jury was predicated upon the assumption that the court and prosecution had supplied him with all relevant information. His assumption was induced by their nonperformance of that duty. The waiver was further predicated on petitioner's erroneous belief induced by the prosecution and the court that the court had an open mind uncluttered and unprejudiced whereas

in fact the court might possibly have been prejudiced by reason of reading atrocious material involving heinous activities and lies in grand jury testimony denied to petitioner.

III

PETITIONER WAS DENIED ACCESS TO THE PART OF THE RECORD ON APPEAL TO THE FIFTH CIRCUIT RELATING TO CLASSIFIED MATERIAL INVOLVED IN THE DEFENSE OF HIS CO-DEFENDANT WILSON AND THIS DENIAL TO PETITIONER TO ACCESS TO PART OF THE RECORD ON APPEAL TO BE USED IN AID OF HIS APPEAL DEPRIVED PETITIONER OF DUE PROCESS, EQUAL PROTECTION AND A FAIR HEARING ON APPEAL

Petitioner and Edwin Wilson were charged in the indictment with conspiracy

to make an illegal shipment of C-4 to Lybia. They were joint co-defendants until the trial date when they were severed.

One of Wilson's defenses was that the C-4 shipment had been authorized by the C.I.A. One of petitioner's defenses was that the shipment was authorized by the National Security Council.

The Munitions Control Act, Section 2778 of 22 U.S.C., provides in (b) (1) that the regulations apply to "every person (other than an officer or employee of the United States Government Acting in an official capacity". (Emphasis added). Wilson's defense was that he was an officer or employee of the CIA and acting in that capacity at the time he was engaged in the alleged conduct charged in the Indictment against him and, therefore,

in such capacity, he was not required to be in compliance with Section 2778.

In its rulings against Wilson, the trial court relied upon United States v. Erlichman, 546 F. 2d. 910 (D.C. Cir. 976), Cert. denied, 429 U.S. 1120 (1977). As noted in the opinion at 546 F. 2d. 918, the offense charged is violation of 18 U.S.C., Section 241, and it is a malum in se offense. There is no defense of "good faith belief" to Section 241. The court said that the defendant raised only mistake in law as a defense and held that such is not a defense to violation of Section 241 (546 F. 2d. at 918-919).

The Erlichman case is not in point because good faith defense was not available to him (as it was to Wilson) and the charges against Wilson (and Bloom) cannot be supported without proof of specific

intent to violate a "known legal duty".

Wilson and Bloom were charged with wilfully engaging in a conspiracy to violate 22 U.S.C., Sections 2778(c) and 49 U.S.C., Section 1804. Violations of these two sections require that the defendant engage in conduct "willfully" with the specific intent to violate the statute.

The defendant must have acted "willfully" and have engaged in conduct "knowing it was unlawful".

United States v. Hernandez, 622 F.ed. 289 (5th Cir. 1981).

United States v. Lizarraga - Lizarraga, 541 F. 2d. 826 (9th Cir. 1976).

The trial court made rulings while Wilson and petitioner were joint defendants and thereafter during Wilson's separate trial denying Wilson the opportunity

of proving his good faith defense that a government operation was involved. If Wilson had been permitted to establish his good faith defense of an operation authorized or sponsored by United States officials, it would have been a good defense to him and to petitioner.

In his Brief to the Fifth Circuit, Wilson filed a regular non-classified Brief and a Classified Brief. His non-classified Brief stated that the following issues were raised in the classified Brief.

Whether the trial court committed error: (1) in denying Wilson his right to present classified information which was relevant to his defense and to the issue of intent, in (2) quashing Wilson's subpoenas to government officials and denying him compulsory process, confrontation and cross-examination, in (3)

not complying with the specific requirements of CIPA; (4) in not ruling that CIPA is constitutional on its face and as applied because it is void for vagueness, it violates the privilege against self incrimination, it violates the confrontation law of the Sixth Amendment and it permits unilateral appeal by the government; in (5) not ruling that Brady V. Maryland was violated by the governments' failure to produce evidence which was exculpatory to Wilson.

After petitioners conviction and after he had filed Notice of Appeal to the Fifth Circuit, he moved the trial court for an order permitting him to see all classified material in the court's file. The judge took the view that, as the appeal was pending, jurisdiction lay in the Fifth Circuit Court of Appeals.

Thereupon petitioner made application to the Fifth Circuit to permit him to see the classified material in the file, which application was denied.

Thereafter petitioner filed on the Fifth Circuit Court a "Motion for Rehearing after denial of Motion to grant access to classified record and for oral argument on Motion".

Petitioner sought to see the classified material in aid of his Appeal and in the preparation of his Brief to the Fifth Circuit Court of Appeals and denying petitioner the right to see the classified material denied petitioner his rights to due process, equal protection and to a fair hearing on appeal.

To deny an appellant in a criminal

case access to the record on appeal is a denial of his constitutional rights to due process and equal protection of the law. Griffin v. Illinois, 351 U.S. 12, 1 16-17 (1955). Proceedings in the appellate court, as well as these in the trial court, must be considered in determining whether due process of law has been afforded or denied. Cole v. Arkansas, 333 U.S. 1948. Wilson v. City of Oklahoma, 395 U.S. 458, 459 (1969).

IV

THE TRIAL COURTS RULINGS AND THE ADMISSION OF HEARSAY EVIDENCE IN THE FORM OF AFFIDAVIT OF D. JERRY RUBINO RELATING TO PETITIONER'S GOOD FAITH DEFENSE UNDER THE CLASSIFIED INFORMATION PROCEDURE ACT VIOLATED APPELLANT'S SIXTH AMENDMENT RIGHT OF CONFRONTATION, CROSS-EXAMINATION, AND COMPULSORY PROCESS AND FIFTH AMENDMENT RIGHTS TO DUE PROCESS AND A FAIR TRIAL

Petitioner believed he was carrying out a National Security Council Directive after being supplied by his client, Brower, with a medallion alleged by Brower to be a National Security Identification Piece. In consequences of this belief and of the possession of this piece, petitioner

after advising Brower that Class A explosives could not be shipped by cargo aircraft, and having been further informed by Brower that Wilson had obtained the required State Department Export License, accepted currency from Brower to be delivered to people represented by Brower to be Wilson's agents in Houston.

Petitioner, in accordance with the Classified Information Procedures Act (Pub. L. 96-456, 94 Stat. 2025, 1980) handed to Judge Sterling a sealed letter dated October 18, 1982. A copy of this letter is attached as Appendix C. In accordance with the Act, petitioner also filed Notice of Intention to disclose classified information. A copy of the Classified Procedures Act is attached as Appendix 1.

This motion was set for hearing at

which time the Government produced an affidavit of D. Jerry Rubino, a copy of which is attached as Appendix G. This affidavit states that the medallion was shown by the Chief of Security of the Department of Justice to named officials of U.S. Customs Service, the Bureau of Alcohol, Tobacco, and Firearms and to unnamed officials of the Central Intelligence Agency. (See paragraphs 5 and 6 of the affidavit). No where in the affidavit does it state that the medallion was shown to, or discussed with, the National Security Council and Brower had represented to petitioner that the medallion was an identification piece of that agency.

Based upon this showing, Mr. Rubino's affidavit (which is hearsay as he did not personally talk to the above named agencies) states: "I have conducted an anal-

ysis...and I have concluded that the information and coin presented to the court by the defendant are not now or have ever been classified National Security Information material..."

Brower never said anything about the medallion being associated with Customs, ATF or the CIA; therefore, the affidavit is not relevant to anything except inferentialy to indicate that the medallion (coin) was not submitted to the National Security Council, but the court received it and ruled that the coin was not classified and the affidavit was admitted into evidence along with appellant's version of its acquisition from Brower.

The trial court concluded that the Rubino affidavit destroyed petitioner's good faith National Security Council defense.

Appellant was denied the opportunity of impeaching Mr. Rubino through cross-examination, resulting in a denial of appellant's Sixth Amendment Right to be confronted by the witness against him.

Davis v. Alaska, 415 U.S. 308 (1974); Douglas v. Alabama 380 U.S. 415 (1965); Pointer v. Texas 380 U.S. 400 (1965).

Since National Security Council officers were available, the prosecution was required to produce them at trial in order to conform with the confrontation clause - Ohio v. Roberts, 488 U.S.56(1980).

The hearsay exception for evidence of the absence of, information in public records, embodied in Federal Rules of Evidence, Rule 803(10), expressly provides a foundation requirement. The necessary pre-requisite is a certificate in compliance with Fed. R. Evid. 902.

United States v. Reich, 580 F. 2d. 929, 938 (9th Cir. 1978), Cert. Denied. 439 U.S. 933 (1978).

The affidavit lacked any indica of reliability and did not comply with Fed. R. Civ. P. 27, 44 (b) and lacked authentication under Rule 44 (a) (1).

The Government's failure to lay a proper foundation as required by law, together with the unreliability of the Rubino affidavit, amounts to plain error under Rule 52 (b), Fed. R. Crim. P. requiring a reversal "to prevent a miscarriage of justice". United States v. Segna, 555 F. 2d. 226 (9th Cir. 1977). The affidavit contained no statement as to the affiant's personal knowledge of the records or concerning the custody of them, was procedurally defective under Fed. R. Civ. P. 47 and 44, Fed. R. Evid.

902, and was in violation of petitioner's Fifth and Sixth Amendment Rights.

Prejudice is presumed from violation of constitutional rights. Estes v. Texas 381 U.S. 532, 542-43 (1964). Curry v. Secretary of the Army, 595 F. 2d. 873 (C.A. D.C., 1979).

At a minimum, the Government should have filed an affidavit from a qualified affiant or produced a competent witness to testify whether or not the records of the National Security Council reveal anything about the medallion and testimony that the shipment of C-4 to Libya was or was not authorized by that Council or its representative.

The Government should have the burden of proving that material is not classified (when assertion is made that it is) since the Government alone is in possession of

all competent evidence relative to the inquiry.

Appellant was charged with willfully engaging in a conspiracy to violate 22 U.S.C. Section 2778(c) and 49 U.S.C., Sec. 1809(b) and knowingly transporting explosives in foreign commerce without a license. Violation of these sections require that the defendant engage in the conduct "willfully" and that the defendant commit the offense with the specific intent to violate the statute.

Congress did not intend to punish innocent or negligent errors, but rather intended to punish only intentional, voluntary violations of a known duty.

United States v. Hernandez, supra, and United States v. Lizarraga - Lizarraga, supra.

Thus, if the defendant comes forward

with some evidence, such as good faith, mistake, etc., that tends to negate the element of willfullness, the Government, in order to prevail, must show that the defendant had no good basis for believing that his conduct was lawful. United States v. Davis, 583 F. 2d. 190 (5th Cir. 1978) involving the Munitions Control Act.

Appellant believed in good faith that his actions were lawful and that belief constitutes a valid defense to a specific intent crime. See, e.g. United States v. Miller, 658 F. 2d. 235, 237 (4th Cir. 1981) Morrissette v. United States, 480 F. 2d. 764, 785, (2nd Cir. 1973), Cert. denied, 414 U.S. 866 (1973).

The basis for the good faith defense is simple in that the Government always bears the burden of proving beyond a reasonable doubt every essential element

of an offense charged in a criminal case. In re Winship 397 U.S. 358 (1970).

Petitioner lacked the degree of knowledge in this case because he believed in good faith that the transport of the explosives was authorized by the Government or its agents. If this belief was mistaken, petitioner's actions could not be considered knowing and intentional. See United States v. Lee, 589 F. 2d. 980 (9th Cir. 1979, Cert. denied 444 U.S. 969 (1979)).

Petitioner testified that Brower stated that the medallion was a National Security piece.

Brower testified that the medallion was for the purpose of people within his own organization identifying themselves.

Brower's testimony concerning the medallion is intrinsically destitute of

probative value as demonstrated on Appendix H.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,



EDWARD JOHN BLOOM

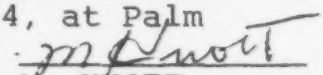
STATE OF CALIFORNIA) PROOF OF SERVICE
COUNTY OF RIVERSIDE) ss BY MAIL

I, the undersigned, say: I am a resident of the County of Riverside; over the age of eighteen years and not a party to the within action or proceeding; that my address is 2611 Linden Way # C, Palm Springs, California.

That on the 17 day of August, 1984, I served the within paper PETITON FOR WRIT OF CERTIORARI by depositing said copy enclosed in a sealed envelope with postage hereon fully prepaid, in the United States Postal Service mail box at the City of Palm Springs, California, addressed as follows: Daniel K. Hedges Solicitor Gen.
United States Attorney of the U.S.
P.O. Box 61129 Dept. of Justice
Houston, Texas 77208-1129 Wn, D.C.2

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 17, 1984, at Palm Springs, California



M. KNOTT

BEST AVAILABLE COPY

APPENDIX 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall...be deprived of life, liberty or property without due process of law.

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a...trial, by an impartial jury ...; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor..."

OFFICIAL BADGES, IDENTIFICATION CARDS, OTHER INSIGNIA

Whoever manufactures, sells, or possesses any badge, identification card, or other insignia, of the design prescribed by the head of any department or agency of the United States for use by any officer or employee thereof, or any colorable imitation thereof, or photographs, prints, or in any other manner makes or executes any engraving, photograph, print, or impression in the likeness of any such badge, identification card, or other insignia, or any colorable imitation thereof, except as authorized under regulations made pursuant to law, shall be fined not more than $ 250 or imprisoned not more than six months, or both.

June 25, 1948, c. 645, 62 Stat. 731.

OFFICER OR EMPLOYEE

OF THE UNITED STATES

Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency, or officer thereof, and acts as such, or in such pretended character demands or obtains any money, paper, document, or thing of value, shall be fined not more than $ 1,000 or imprisoned not more than three years, or both. June 25, 1948, c. 645, 62 Stat. 742.

TITLE 18, UNITED STATES CODE

Par. 371, CONSPIRACY TO COMMIT OFFENSE...

If two or more persons conspire...to commit any offense against the United States...and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more

than five years, or both....

TITLE 18, UNITED STATES CODE

Par. 1001. STATEMENTS OR ENTRIES GENERALLY

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully...makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $ 10,000 or imprisoned not more than five years, or both.

TITLE 18, UNITED STATES CODE

Par. 2. PRINCIPALS

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

TITLE 22, UNITED STATES CODE, Par. 2778.

CONTROL OF ARMS EXPORTS AND IMPORTS

(a) (1) In furtherance of world peace and the security and foreign policy of the United States, the President is authorized to control the import and the export of defense articles and defense services and to provide foreign policy guidance to persons of the United States involved in the export and import of such articles and services. The President is authorized to designate those items which shall be considered as defense articles

and defense services for the purposes of this section and to promulgate regulations for the import and export of such articles and services. The items so designated shall constitute the United States Munitions List.

(2) Decisions on issuing export licenses under this section shall be made in coordination with the Director of the United States Arms Control and Disarmament Agency and shall take into account the Director's opinion as to whether the export of an article will contribute to an arms race, increase the possibility of outbreak or escalation of conflict or prejudice the development of bilateral or multilateral arms control arrangements.

(b) (1) As prescribed in regulations issued under this section, every person

(other than an officer or employee of the United States Government acting in an official capacity) who engages in the business of manufacturing, exporting, or importing any defense articles or defense services designated by the President under subsection (a) (1) of this section shall register with the United States Government agency charged with the administration of this section, and shall pay a registration fee which shall be prescribed by such regulations. Such regulations shall prohibit the return to the United States for sale in the United States (other than for the Armed Forces of the United States and its allies or for any State or local law enforcement agency) of any military firearms or ammunition of United States manufacture furnished to foreign governments

by the United States under this chapter or any other foreign assistance or sales program of the United States, whether or not enhanced in value or improved in condition of a foreign country. This prohibition shall not extend to similar firearms that have been so substantially transformed as to become, in effect, articles of foreign manufacture.

(2) Except as otherwise specifically provided in regulations issued under subsection (a) (1) of this section, no defense articles or defense services designated by the President under subsection (a) (1) of this section may be exported or imported without a license for such export or import, issued in accordance with this chapter and regulations issued under this chapter, except that no license shall be required for exports or imports

made by or for an agency of the United States Government (A) for official use by a department or agency of the United States Government, or (B) for carrying out any foreign assistance or sales program authorized by law and subject to the control of the President by other means.

(3) No license may be issued under this chapter for the export of any major defense equipment sold under a contract in the amount of $ 25,000,000 or more to any foreign country which is not a member of the North Atlantic Treaty Organization unless such major defense equipment was sold under this chapter. The prohibition contained in the first sentence of this paragraph shall not apply to the issuance of licenses under this section for the export of major defense equipment to

Australia, Japan, or New Zealand, or major defense equipment sold commercially in implementation of an agreement between the United States Government and the government of a foreign country for the production of the major defense equipment to which such licenses relate if the President has submitted a certificate with respect to such proposed agreement prior to its signature, to the Speaker of the House of Representatives and to the chairman of the Committee on Foreign Relations of the Senate in the same form as the certification required under section 2776(b) of this title and subject to the requirements of such section.

(c) Any person who willfully violates any provisions of this section or section 2779 of this title, or any rule or regulation issued under either section,

or who willfully, in a registration or license application or required report, makes any untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $ 100,000 or imprisoned not more than two years, or both....

TITLE 22, CODE OF FEDERAL REGULATIONS Par. 121.01

THE U.S. MUNITIONS LIST.

Pursuant to the authority cited supra the following articles[1] are hereby designated as arms, ammunition, and implements of war.

(Category V) Propellants, Explosives, and Incendiary Agents

---

1. The term "article" shall mean any of the arms, ammunition, and implements of war and technical data relating thereto enumerated in the U.S. Munitions List (See Par. 123.38).

(b) Military explosives (see Par. 121.10).(sic)

TITLE 22, CODE OF FEDERAL REGULATIONS PAR. 121.11 MILITARY EXPLOSIVES

The term "military explosives" includes, but is not limited to, the following:

(d) cyclotrimethylene-trinitramine (RDX, CYCLONITE, HEXOGON or C4).

TITLE 22, CODE OF FEDERAL REGULATIONS PAR. 123.01 EXPORT LICENSE.

Equipment (see Par. 121.02 of this subchapter for definition) on the U.S. Munitions List shall not be exported from the United States until a license has been obtained from the Department of State, or it is otherwise exempt under other provisions of this subchapter. As

a condition precedent for the issuance of an export license for equipment the Department of State may require all pertinent documentary information regarding the proposed transaction, and may also require the execution of an appropriate bond. (Applications for export license where the value is $ 50,000 or more shall be accompanied by a copy of the relevant DD form 1513 in cases involving the U.S. Foreign Military Sales program, and by a copy of a firm order or letter of intent in other cases.)

TITLE 49, UNITED STATES CODE

PAR. 1809. PENALTIES

(b) A person is guilty of an offense if he willfully violates a provision of this chapter or a regulation issued under this chapter. Upon conviction, such person shall be subject, for each offense,

to a fine of not more than $25,000, imprisonment for a term not to exceed 5 years, or both.

TITLE 49, CODE OF FEDERAL REGULATIONS

PAR. 172.100 PURPOSE AND USE OF THE TABLE.

(a) The table set forth in Par. 172.101 constitutes a designation of the materials listed therein as hazardous materials for purposes of the transportation of those materials in commerce. In addition, it classifies and specifies requirements and references other requirements set forth elsewhere in this subchapter pertaining to the labeling, packaging and transportation of those materials.

(g) Column 6 indicates the maximum net quantity in one package for air trans-

portation or passenger railcar;

(2) Column 6 (b) lists the maximum net quantity for one outside package on cargo aircraft. Packaging must bear the CARGO AIRCRAFT ONLY label when the quantity of hazardous material exceeds that authorized on passenger-carrying aircraft, or is forbidden on passenger-carrying aircraft.

The word forbidden appears in Column 6 under High Explosive which includes cyclotrimethylene-trinitramine.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 83-2363

D. C. Docket No. CR H-82-139

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
JUN 7 1984
JESSE E. CLARK, CLERK
BY DEPUTY: M. Cooper

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EDWARD J. BLOOM,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

Before RANDALL, TATE and WILLIAMS, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

APRIL 19, 1984

ISSUED AS MANDATE: MAY 31 1984

[illegible]
Michael Cooper

[illegible]
P. Kellen

MAY [illegible]

APPENDIX A

OP-JDT-9

BEST AVAILABLE COPY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DOCKET NO. H-82-139

UNITED STATES OF AMERICA

v.

EDWARD JOHN BLOOM

(Filed June 15, 1983)

JUDGMENT AND COMMITMENT

In the presence of the attorney for the government the defendant appeared in person on this date, June 14, 1983, without counsel, pleading not guilty.

There being a verdict of guilty.

Defendant has been convicted as charged of Count 1: Conspiracy to violate the Arms Export Control Act of 1976; 18 USC 371. Count 2: Fraudulent Statements; 18 USC 1001:2. Count 3: Violation of Munitions Control Act; 22 USC 2778(c). Count 4: Unlawfully transporting hazardous materials in foreign commerce: 49 USC 1809(b).

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his

authorized representative for imprisonment for a period of TWO (2) YEARS as to each Count 1, 2, 3 and 4, to run concurrent to each other. Execution of sentence as to Counts 1, 2, 3 and 4 is suspended and defendant is placed on probation with supervision for five (5) years.

Special conditions are as follows:

1. Defendant is required to participate in a residential program at a community treatment center for a period not to exceed 120 days.
2. Defendent is not permitted to travel outside the continental United States.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

/s/ ROSS N. STERLING
U. S. District Judge

APPROVED AS TO FORM:

/s/ DEPUTY

DATED: June 15, 1983

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
MAY 21 1984
GILBERT F. GANUCHEAU
CLERK

No. 83 2363

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EDWARD J. BLOOM,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

---

ON PETITION FOR REHEARING

(May 21, 1984)

Before RANDALL, TATE and WILLIAMS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

Carolyn Dineen Randall
United States Circuit Judge

APPENDIX B

Memorial Plaza Holiday Inn
2100 MEMORIAL DRIVE
HOUSTON, TEXAS 77007

Filed Oct 18, 1982
Lone Star Steel

SEALED

To The Hon. Ross Sterling
Judge of the United States District Court
Houston Texas —

Delivered in open Court.

Appendix C,

DEFENDANT'S EXHIBIT

BEST AVAILABLE COPY

Dear Mr. Voss [illegible]

The enclosed is an alleged
Classified Identification piece
delivered to me by Jerome L. Brower in
October 1977 and alleged by him to have
been given to him by Defendant Edwin P. Wilson,
to be shown by me to any A.T.F. or U.S. Customs
Service Federal official who might attempt to
search the cargo aircraft shipped from
Houston to Libya being made by Mr. Wilson's agents.
Brower told me that upon production of this piece
government agent would "go away."

I do not vouch for the truth of Mr. Brower's
claims in any way in view of his pleading guilty to
perjury in the related case of U.S. v. Wilson & Brower USDC 80-200
Cr. I need to introduce this article in my
defense if it is not genuine.

2100 MEMORIAL DRIVE, HOUSTON, TEXAS 77007 PHONE (713) 869-3261

If ~~that~~ genuine (or classified)
I do not care to jeopardize the
security of those who may be
authorized to carry it, and will
attempt my defense by merely
calling it an alleged National Security
identification piece without otherwise
describing it. While allegedly given to
Brower by Allen who was allegedly C.I.A.
Brower did not call it a C.I.A. identification
piece, but a "National Security identification
piece." I returned it to Brower on my
return from Libya and he gave it to William Hundley -
his (~~then~~ my) Washington attorney. Mr. Hundley gave
it to me, cautioning me of Brower's impaired
credibility.

END OF APPENDIX C

BEST AVAILABLE COPY

To the Hon. Ross Sterling:

The enclosed is an alleged National Security Identification piece handed to me by Jerome S. Brower in September 1977 and alleged by him to have been given to him by Defendant Edwin P. Wilson, to be shown by me to any ATF or U.S. Customs or other Federal official who might attempt to interfere with the cargo aircraft shipment from Houston to Libya being made by Mr. Wilsons agents. Brower told me that upon production of this piece the government agent would "go away".

I do not vouch for the truth of Mr. Browers statements in any way in view of his pleading guilty to felony in the related case of U.S. V. Wilson & Brower USDC 80-200 D.C. I need to introduce this article in my good faith defense if it is not genuine. (over)

If genuine (or classified) I do not care to jeopordize the security of those who may be authorized to carry it, and will attempt my defense by merely calling it an alleged National Security identification piece without otherwise discribing it. While allegedly given to Brower by Wilson who was allegedly C.I.A. Brower did not call it a C.I.A. identification piece, but a "National Security identification piece". I returned it to Brower on my return from Libya and he gave it to William Handley's his (and my) Washington attorney, Mr. Handley gave it to me, cautioning me of Browers impaired credibility.

Very respectfully,

EDWARD JOHN BLOOM

APPENDIX D

COMMENTS ON AND SOME TESTIMONY EXCISED FROM COPIES OF GRAND JURY TRANSCRIPTS FURNISHED TO PETITIONER

In Brower testimony before the grand jury in Washington, D.C. on August 23, 1979, in the portions of the transcript deleted from the copy given to petitioner Brower testified:

(1) Interrupted the questioning twice and stated that he wanted to talk to his attorney (pages 35-45 and 66). Petitioner was his attorney.

(2) Testified that he could not remember the names of the people, about 4 in number, that he sent to Libya, except that he sent his employee Smith to Libya, but that on this job Smith was not his employee but was employed by Wilson.

(Pages 36-37, 66-67); that he next saw Wilson when he went to collect for Smith's services (page 42); and when asked again the names of the people he sent to Lybia he asked to talk to his attorney and when he came back, he claimed the Fifth Amendment. (pages 66-67).

(3) Testified on pages 43-45 concerning a statement he had given the FBI in April 1977, in which he said he had told Wilson and Terpil to get lost - that he did not want any part of them. On pages 67-69, he was asked why he had told Wilson and Terpil to get lost, he said he was uncomfortable with the operation and because they were not paying their bills. He was reminded that he had testified that he had been paid in full and when asked what bills had not been paid, he took the Fifth Amendment.

After Brower made his deal with the Government and agreed to testify truthfully, he was called before the grand jury in Washington, D.C. on September 10, 1980. On pages 40-49 of the transcript of that proceeding Brower named the people he sent to Libya and testified that he told them they would be working in Libya in the manufacture of clandestine booby trap bombs and in the instruction of others in the manufacture of same with a cover story that they were working on mine clearance.

Brower then testified as follows:

Q. And in your discussions with Ed Wilson and Frank Terpil about that being a cover story to give, why did they decide to pick that cover story? Was it because that would sound legitimate?

A. Yes.

Q. Did they give you that reason, or did they --

A. Yes. And besides that, there had been previous contracts given out where people have been clearing mines on the Benghazi area, the Egyptian/Libyan border, and clearing mines from under the -- from underwater in the Tripolian Harbor.

Q. So it would be a fairly convincing cover story?

A. Oh, yes.

In Brower's testimony before the grand jury in Washington, D.C. on September 11, 1980, the following questions were answered as follows:

Q. And what sort of -- To what country were they talking about delivering these explosives?

A. To north Africa, Libya.

Q. Did they say what they needed all the explosives for?

A. They were talking about mine clearing and instructional units, and--

Q. All right. Let me put the question to you this way, Mr. Brower. When you went to the meeting and when you were discussing the needs of Mr. Wilson and Mr. Harper, when you were discussing their needs, you had in mind, did you not, something that you wanted to accomplish by getting into a Libyan market?

A. Oh, yes.

Q. And what sort of things did you want to accomplish by getting into that market?

A. Okay. What we wanted to do was to be able to develop an open market for all of our products, and to develop business in that area, and in order for us to get over there, we would have to supply them

with this material and they would then further the sale of our products in that area.

Q. All right. So you were interested in getting a foot in the door, so to speak, in Libya?

A. Correct.

Q. And what types of things were you thinking of that you would be able to do in the future in Libya?

A. Well, there we could do underwater demolition; we could clear the Tripoli Harbor. We could work in the Benghazi mine fields, and, in general, this type of work.

Q. So there were a number of things that you probably could get into in Libya?

A. One other thing, too; we could teach their people how to dive and so

forth.

Q. But when Wilson and Harper and the group present at that meeting, when they were talking to you about what they were doing in Libya and what they wanted to do for them --

A. It was different.

Q. Okay. What was it strictly?

A. They were to teach the Libyans how to make explosive devices.

Q. And when you say "explosive devices," what do you mean?

A. Demolition devices, booby traps, mines, fuses, and that sort of stuff.

Q. Like turning a household item into a bomb?

A. Yes.

Q. Like a lamp that you turn the light on, and it goes "boom"?

A. Lamps, toasters --

Q. Articles of that nature?

A. Yes.

(Pages 17, 18, and 19)

In connection with sending his men to Libya in 1976 Brower testified on page 49 that they met at his house in California and they "...traveled with myself and my wife to Washington", they were taken to Wilson's place in Virginia.

Brower then testified on page 51 as follows:

Q. When you were at Wilson's farm, did you say that your wife, Peggy, was with you also?

A. Yes.

Q. What happened after your meeting at the farm?

A. Well, when we were setting this whole thing up, Wilson and his wife -- this is prior to, I believe, and possibly by

phone -- stated that his wife had not had a vacation in some time, and I said mine hadn't either, so since we were going to be going over, we might as well take a trip, the four of us, around the continent and just show our wives a good time for a vacation, for two weeks.

Q. So what happened?

A. When we got over there, I was there about one day or so, and we were all staying at this one hotel -- the men had left to go to Libya -- and I got a call and Ed says, "Can you get packed right away? We're going to Libya."

Q. Did you go to London also?

A. Yes.

Q. And from London, you and Ed Wilson left in a day or two to go to Libya? Is that what you're saying?

A. Yes. (Page 52)

On page 72 of the transcript Brower testified that he told the people he sent to Libya "...while they were over there any new business they would get we would give them 10 percent of the gross sale for themselves, so this is incentive so they could get us new business..."

On pages 38 and 39 of the Transcript Brower testified as follows:

Q. When you agreed to supply men for Mr. Wilson and Mr. Terpil, was there any statement by Mr. Wilson or Terpil that they would be doing anything other than this operation of making clandestine devices and teaching Libyans or others how to make them?

A. No.

Q. That was the only thing that they were supposed to be doing when they went over?

A. Right.

Q. Did Mr. Wilson or Mr. Terpil say anything about a cover story to be used in connection with their -- the men's participation in this project in Libya?

A. Yes.

Q. Who said it, and what was it that they said?

A. It was between -- I guess between Terpil, Wilson, and myself. We were going over there for mine clearance and harbor clearance.

Q. That was the story that was supposed to be given to others?

A. That is correct.

Q. But the truth of the matter was that the men were going over there simply for this operation of constructing booby trap bombs and teaching others how to construct booby trap bombs?

A. Yes; in addition to getting any other contracts within this realm that they could do.

Q. That was for you, though; not for Wilson and Terpil?

A. Correct.

Brower also testified before the grand jury in Washington, D.C. on September 10, 1980, as follows:

> "When you testified originally in this matter on Thursday, of August 23, 1979, and I think it is fair to say that many of the same questions that were put to you today were put to you then...some of your answers were less candid or truthful with respect to the information that was being sought of you. Do you have any explanation as to why you were not more forthcoming

with the Grand Jury at that time that you would like to share with me today?

A. No, I think I was just being less than candid.

Q. Would it be fair to say that you did not want to acknowledge your involvement in this operation?

A. Well, I think I was more interested in protecting the people I was working with.

Q. And in doing that protection, isn't safe to say, Mr. Brower, that you misled the Grand Jury with your testimony last time.

The Witness: I would say yes.

Mr. Barcella: And isn't it safe to say that in trying to protect those people that misleading included inaccurate answers to some questions.

The witness: I would also say yes."

(Pages 102-103)

And Brower testified before the Houston Grand Jury on March 9, 1982, as follows:

Q. "Mr. Brower, is it correct that you have testified on two occasions in the District of Columbia before a Grand Jury?"

A. Yes (page 65, lines 22-25)...

Q. "Would it be fair to say that your first testimony before the Grand Jury in D.C. was somewhat different from your second testimony?"

A. Yes (page 66, lines 13-16)...

Q. "Were you indicted in the District of Columbia in March of 1980?"

A. I believe so.

Q. After the return of that indictment, did you enter into an agreement

with the United States Government by which you plead guilty to one Count of the Indictment and agreed to testify truthfully as to your knowledge of certain matters?

A. Yes.

Q. On behalf of the United States?

A. Yes (page 66, line 23 to p. 67, line 7).

Peggy Brower, the wife of and office manager for Brower, testified in petitioner's trial on May 19, 1983, as follows:

Q. During the year, 1977, did you have any knowledge of what Mr. Brower was doing in connection with either Mr. Wilson or Consultants International or Libya or any thing of that kind?

A. No, sir.

The testimony of Mr. Brower was denied to petitioner in which Brower testified that his wife accompanied Brower and his men to Washington, to Wilson's farm in Virginia for a conference and Mr. & Mrs. Brower went with Mr. and Mrs. Wilson to London intending to tour Europe, but Wilson got a phone call as a result of which he and Brower went to Libya. Since petitioner did not know of the foregoing, he could not cross-examine her concerning her participation in or knowledge of Brower's activities in connection with shipment of C-4 and other explosive devices to Libya. In such situation petitioner was foreclosed by Mrs. Brower's apparently false answer that she had no knowledge of Brower's nefarious activites in Libya.

After Brower's employee Smith, made a deal with the Government, he recanted much of his prior testimony before the Washington, D.C., grand jury on September 13, 1979, and testified before that grand jury on September 11, 1980.

In his 1980 testimony he testified to a shipment of C-4, explosive device and a gun Brower made from the airport at Ontario, California, via Uganda Airlines to Uganda in March 1977. The following questions were asked and answers given:

Q. Was there anyone else present, assisting at the loading?

A. The captain of the plane, a couple of air crewmen, I believe there was some -- I just don't -- Well, my brother was there helping.

Q. Any other people associated with the

firm?

A. I believe Mr. Bloom was either there or he had been there. I remember seeing him there at the airport. I'm not sure if he was there that morning or if it was the day previous.

Q. Now, when you took off, that was what, on the 20th of September?

A. That would be on the 20th.

(Grand Jury transcript, Washington, D.C. September 11, 1980, page 65).

The reference to September 20 is to the year 1977, which is about ten days prior to the C-4 shipment involved in petitioner's case. Smith left with the Uganda plane and, while in Uganda, instructed Ugandans in the use of explosive devices.

Brower made the Uganda shipment at the request of a Mr. Terpil.

Smith was asked the following questions and answered same as follows:

Q. Since you left Uganda, have you ever spoken with or seen Mr. Terpil?

A. No, sir.

Q. And I take it, therefore, you've never talked with him about the substance of your testimony today?

A. No, sir.

Q. Other than Mr. Bloom, your lawyer, have you talked with anybody about your testimony today?

A. No, sir.

(Grand Jury transcript of testimony, Washington, D.C. grand jury, September 11, 1980, page 69).

On pages 46-48 of the transcript of Smith's testimony before the Washington Grand Jury on September 13, 1978, he referred to notes he had made based on

"what I can remember and what Peggy Brower and Jerry Brower and I have been able to go back and piece together of what happened" in connection with shipment of C-4 and other items "on or after March 23, 1977".

On page 14 of Smith's testimony before the Washington, D.C. grand jury on September 13, 1979, he testified that he always drew his pay from Brower's corporation, J. S. Brower and Associates.

The transcript of Brower's testimony before the grand jury in Washington, D.C. on August 23, 1979, consists of 68 pages of testimony. The excised copy of the transcript supplied to petitioner contained 34 blank pages and 19 other pages with excisims.

The transcript of Brower's testimony before the grand jury in Washington, D.C.

on September 10, 1980 consists of 100 pages of testimony. The excised copy of this transcript furnished to petitioner contains 68 blank pages and 23 pages with excisions.

The transcript of Smith's testimony before the grand jury in Washington, D.C. on September 13, 1979, comprises 92 pages of testimony. The redacted copy of this transcript supplied to petitioner contained 72 blank pages and 2 pages with excisions.

The transcript of Smith's Washington D.C. grand jury on September 11, 1980, comprises 83 pages of testimony. The redacted copy of this transcript supplied to petitioner contains 70 blank pages and 6 pages with excisions.

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

UNITED STATES OF AMERICA :

v. : Criminal No. H-82-139

EDWARD J. BLOOM, et al :

AFFIDAVIT 83-2363

D. JERRY RUBINO, being duly sworn deposes and says:

1. I am the Department Security Officer, United States Department of Justice. In this capacity I am responsible to the Assistant Attorney General for Administration and the Attorney General of the United States for assuring compliance within the Department of Justice with the provisions of Executive Order 12365, entitled "National Security Information". This Executive Order, and its predecessor orders, provides direction and guidance regarding classified information, material and facilities. The Executive Order also provides direction and guidance regarding the determination of classifiability of information, material, and facilities.

2. I submit this affidavit in response to the presiding Judge's request for assistance on October 18, 1982, in the above-captioned case, regarding the classified nature of and/or classifiability of the following:

- o A handwritten letter from the defendant Bloom to the Honorable Ross Sterling, dated October 18, 1982 written on Holiday Inn (Memorial Plaza) Stationary. (Filed October 18, 1982 by Judge Ross N. Sterling Exhibit A)

- o A silver coin approximately 1 1/2" in diameter and 1/8" thick. One side is struck with a Liberty Bell likeness with the words "Liberty Mint" at the top of the bell. The words "ONE TROY OUNCE" appear above the bell and the words "999 SILVER" appear below the bell on the outer circumference of the coin. The reverse side of the coin has an eagle perched atop a branch. The words "GOD, MAN AND COUNTRY" appear above the eagle on the outer circumference of the coin. Below the eagle, also along the outer circumference, appears a laurel branch with the date "1974" appearing midway in this branch. (Exhibit B)

DEFENDANT'S EXHIBIT 28

c A seventeen (17) page typewritten transcript dated "(IN CHAMBERS, OCTOBER 18, 1982)," which refers to CRIMINAL ACTION NO. H-82-139. This transcript is certified by Court Reporter CLINTON B. GETTIG. (Exhibit C)

3. On October 19, 1982, I dispatched James Londergan, a Security Officer on my staff, to meet with the presiding Judge and to pick up those articles of evidence described in paragraph 2 hereinbefore. Mr. Londergan returned to Washington, D.C. at 6:30 p.m., October 19, 1982. These articles of evidence have been either in Mr. Londergan's personal custody or secured in our security vault since received from the presiding Judge.

4. On October 20, 1982 at 0915 a.m., I met with Messrs. Londergan and Orfeo Trombetta Jr, my special Assistant, to determine a course of action to determine, as requested by the presiding Judge, the classified nature of or classifiability of this evidence.

5. At 11:00 a.m., October 20, 1982, Messrs. Londergan and Trombetta hosted a meeting with the following U.S. Government officials:

- Stuart P. Seidel
  Assistant Chief Counsel (Enforcement and Operations)
  U.S. Customs Service
- Garnet J. Fee
  Customs Inspector, Program Manager
  U.S. Customs Service
- Eddie Z. Pali
  Special Agent
  Bureau of Alcohol, Tobacco, and Firearms
  U.S. Department of Treasury
- Michael C. Huckaby
  Acting Deputy Chief, Investigations
  Bureau of Alcohol Tobacco, and Firearms
  U.S. Department of Treasury

Each individual was afforded the opportunity to review the evidence entrusted to Mr. Londergan by the presiding Judge. Each was provided with a photocopy of the coin and requested to determine, through applicable senior officials in their respective agencies, whether or not such a coin has ever been used as described by the Defendant. Although the Defendant's October 18, 1982 letter to the presiding Judge and the transcript of proceedings occurring in chamber on October 18, 1982 were reviewed, copies of these documents were not made.

6. At 5:15 p.m., October 20, 1982, Messrs. Londergan and Trombetta met with senior officials of the Central Intelligence Agency. The evidence was reviewed by these Officials and photocopies of the coin provided for their use internally. At no time was the transcript released or copied.

7. On October 21, 1982, in order to develop some credible information about the coin itself and possibly the "Liberty Mint," a telephonic request R for assistance was placed to the Counterfeit Division of the U.S. Secret Service. Based on a return telephonic report from Ted Hall, Special Agent, Counterfeit Division, U.S. Secret Service, who is an experienced numismatist, both in the U.S. Government and in his private endeavors, all available know professional numismatist sources fail to identify a "Liberty Mint" per se currently. In all probability, based on a cursory check of available records, and deductive reasoning, the "Liberty Mint" was a part of a now defunct company known as Liberty Metals, Incorporated, once located in Provo, Utah. The coin itself was probaby mass produced as a "bullion piece" popular in the 1974 time-frame due to the then current values of pure silver. The coin is probably not a unique one-of-a-kind collectors piece.

8. As the Department Security Officer, U.S. Department of Justice, I have conducted an analysis pursuant to the Courts request, based on the information provided by the Court (Exhibits A-C) and by the aforementioned agencies (affidavits shown as Exhibits D-G) and I have concluded that the information and coin presented to the Court by the Defendant are not now or have ever been classifiable National Security Information/material as defined by Executive Order 12356 or its predecessor orders.

9. Accordingly, the information and coin submitted for review by the Court do not require special protection as specified in the Security Procedures pursuant to the Classified Information Procedures Act.

Respectfully Submitted

D. Jerry Rubino

D. Jerry Rubino
Department Security Officer
U.S. Department of Justice

Subscribed and sworn before me this 21st day of June, 1982.

NOTARY PUBLIC

My commission expires March 14, 1985.

APPENDIX G

APPENDIX H

COMMENTS ON LACK OF PROBATIVE VALUE OF BROWER'S TESTIMONY

1. Brower is an admitted, convicted felon; he admitted that he intentionally and deliberately violated the law with respect to the subject shipment; he admitted engaging in terrorist activites by teaching Libyans in 1976 and 1977 how to put explosives in clandestine household items; he admitted that he acted dishonestly in changing the invoice to reflect 60 pounds in each can containing C-4 instead of the true weight of 50 pounds per can.

2. In his plea bargain with the United States, Brower ageeed to testify truthfully against petitioner and others and, if he told the truth and admitted telling Bloom that the medallion was

National Security Agency identification piece (if, in fact, it was not), he would have been guilty of the crime of falsely pretending to be an officer or employee of the United States (18 U.S.C. 912) and possibly guilty of a crime under 18 U.S.C. Sec. 701 relating to possessing colorable imitation of a United States identification piece.

3. When Brower could not recall facts clearly and he was asked if Bloom said so and so, he replied: If Bloom says that, then it is true. And when questioned about whether envelopes he gave to Bloom to take to a Switzerland Bank were sealed or not, he could not remember but said that if Bloom says they were sealed "Then I believe him".

In other words, Brower says Bloom is truthful in all respects, except con-

cerning Brower representing the medallion to be a National Security Identification piece.

4. Brower admitted testifying falsely before the Grand Jury.

Brower appeared before the Washington Grand Jury on August 23, 1979.

Thereafter he and others were indicted in the United States District Court for the District of Columbia, No. 80-00200. The Indictment charged Brower and others with, among other things, conspiracy illegally to ship explosives to Libya. Counts 7 and 8 of the Indictment charge Brower with perjury in his testimony before the Washington Grand Jury on August 23, 1979.

Thereafter, Brower made a deal with the Government and pleaded guilty to Count 3 of the Indictment.

Brower was again called before the Washington Grand Jury on September 10, 1980, and his testimony was different from his earlier testimony before the grand jury.

Browers exculpatory agreement with the United States would not protect him from prosecution under Sections 701 & 912.

It would have been ridiculous for Brower to give appellant the medallion for identification within Brower's organization. Appellant knew all of the people in Brower's organization; and when Brower gave the medallion to appellant, Brower told appellant to ride the plane to Lisbon and get off and it was not contemplated that appellant accompany the shipment from Lisbon to Libya, according to Brower's testimony, which was supported by appellant's testimony; therefore, there was no

need or purpose to provide an identification piece for anyone in Libya or in Portugal where Brower had no people. And at that time none of Brower's people were in Libya.

It is obvious from the foregoing that Brower's testimony concerning the medallion is inherently not believable and amounts to a story he fabricated. If he told the truth, he would open the door to further prosecution of him for falsely representing that he represented an agency of the United States and falsely using or representing that bogus emblem was a government emblem.

The testimony of Brower, who admitted giving appellant the emblem, is certainly not sufficient to overcome appellant's otherwise uncontradicted testimony concerning the medallion for possible use in a National Security operation.

Office - Supreme Court, U.S.
FILED
DEC 6 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-269

In the Supreme Court of the United States

OCTOBER TERM, 1984

EDWARD J. BLOOM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

FRANCIS J. MARTIN
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether petitioner is entitled to a new trial because certain Jencks Act material was redacted by the trial court.

2. Whether petitioner's waiver of a jury trial was voluntary.

3. Whether petitioner's prosecution of his appeal was prejudiced by his inability to obtain access to classified portions of the record on appeal in the case of a co-defendant who was separately tried.

4. Whether the district court properly relied on an affidavit in making a preliminary determination of the admissibility of an item of evidence pursuant to the Classified Information Procedures Act, 18 U.S.C. App. III.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-269

EDWARD J. BLOOM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. A1) is noted at 732 F.2d 939 (Table).

JURISDICTION

The judgment of the court of appeals (Pet. App. A1) was entered on April 19, 1984. A petition for rehearing was denied on May 21, 1984 (Pet. App. B). On July 5, 1984, Justice White extended the time for filing a petition for a writ of certiorari to and including August 19, 1984 (a Sunday), and the petition was filed on August 20, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Southern District of Texas, petitioner was convicted on one count of conspiracy to export falsely labeled and hazardous explosives, in violation of 18 U.S.C. 371; on one count of falsifying shipping documents submitted to Customs officials, in violation of 18 U.S.C. 1001; on one count of unauthorized shipment of munitions, in violation of 22 U.S.C. 2778(c); and on one count of air transport of hazardous cargo, in violation of 49 U.S.C. (1976 ed.) 1809(b).[1] Petitioner was given a suspended sentence of four concurrent two-year terms of imprisonment and placed on probation for five years (Pet. App. A2-A3). The court of appeals affirmed without opinion (*id.* at A1).

The facts pertinent to petitioner's conviction may be briefly summarized as follows. In 1977, Jerome S. Brower, a dealer in explosives, met with Edwin P. Wilson and certain Libyan nationals in Washington, D.C. Wilson expressed interest in obtaining explosives for shipment to Libya. Brower agreed to obtain 42,300 pounds of plastic explosives for Wilson, with payment to be made through Brower's Swiss bank account. 4 R. 25-30. Petitioner, who was Brower's attorney, travelled to Switzerland to pick up the money to pay for the explosives, and then he hand carried the payments to each of the three manufacturers from whom Brower had arranged to obtain the explosives (4 R. 35-36; 5 R. 66-67, 115). Petitioner also arranged for a chartered flight to transport the ex-

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[1] Petitioner was charged along with co-defendants Edwin P. Wilson and Donald R. Thresher. Wilson was tried separately and convicted. See *United States* v. *Wilson*, 732 F.2d 404 (5th Cir. 1984), cert. pending, No. 84-5411. Thresher entered a guilty plea.

plosives to Libya, but he did not disclose to the charter's agent that the cargo would be explosives (5 R. 71-76, 81). The explosives, falsely labeled as drilling mud, were loaded onto the aircraft in Houston (4 R. 44, 58). Petitioner then rode with the cargo to Lisbon, Portugal, where Brower joined the flight, which continued on to Libya (3 R. 84; 4 R. 52-53). Brower paid petitioner $10,000 for his efforts in connection with the shipment of explosives (4 R. 41-42).

Petitioner's defense rested on his assertion that the explosives shipment had been undertaken on orders of the National Security Council (3 R. 43-44). Petitioner claimed that he had been so advised by Brower, who gave him a silver medallion and stated that it was a National Security Council identification piece (4 R. 43-44). Brower denied making any such statement, however, and instead testified that it was much later, possibly in 1982, when petitioner asked him for the medallion (4 R. 60-64, 96-98, 117).

ARGUMENT

1. Petitioner contends (Pet. 23-33) that the redaction of certain Jencks Act material by the district court deprived him of access to prior grand jury testimony that would have aided his defense. This claim does not warrant further review.

The Jencks Act, 18 U.S.C. 3500, requires the disclosure of any prior statement by a government witness regarding the subject matter of his direct testimony at trial. Material in government files that is arguably not discoverable may be submitted to the district court for an in camera determination of the extent of the government's discovery obligation. 18 U.S.C. 3500(c). Petitioner complains that he was denied "superb material * * * for cross-examin[a-

tion]" (Pet. 28) by the district court's in camera redaction of portions of the grand jury testimony of three witnesses. However, two of those witnesses, Douglas Smith and Peggy Brower, were not called as government witnesses; instead, they were called by petitioner as defense witnesses. Accordingly, the government was under no Jencks Act obligation to turn over their grand jury testimony. 18 U.S.C. 3500(b); see, *e.g.*, *United States* v. *Natale*, 526 F.2d 1160, 1170 n.14 (2d Cir. 1975), cert. denied, 425 U.S. 950 (1976).[2]

The third witness, Jerome Brower, had testified before a grand jury regarding the explosives shipment to Libya and also testified about the same subject at trial. Petitioner was provided with the portions of Brower's grand jury testimony that pertained to the explosives shipment. Petitioner was not given those parts of Brower's grand jury testimony that related to Brower's and Wilson's training of Libyans in the construction of terrorist devices, such as exploding briefcases and letter bombs. There was no Jencks Act violation in the district court's redaction of this testimony because Brower did not testify about this subject at trial. The Act entitles petitioner only to those statements of a government witness that "relate[] to the subject matter as to which the witness has testified" (18 U.S.C. 3500(b)).

Nor was there any *Brady* violation in the redaction of Brower's grand jury testimony. Petitioner

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[2] Nor did the government have any obligation under *Brady* v. *Maryland*, 373 U.S. 83 (1963), to provide petitioner with the grand jury testimony of Smith and Peggy Brower. Their grand jury testimony was in no way exculpatory, nor has petitioner demonstrated how the allegedly suppressed evidence would have been helpful. *United States* v. *Agurs*, 427 U.S. 97 (1976).

does not contend that the redacted testimony was in any way directly exculpatory; he merely argues (Pet. 28) that he would have used it on cross-examination to impeach Brower's credibility. To be entitled to this testimony, however, petitioner must show that the suppressed evidence would have created "a reasonable doubt that did not otherwise exist." *United States* v. *Agurs*, 427 U.S. 97, 109-112 (1976); see also *United States* v. *Mesa*, 660 F.2d 1070, 1076 (5th Cir. 1981) (defendant must show that undisclosed impeachment evidence probably would have resulted in an acquittal). The impeachment evidence cited by petitioner clearly fails to satisfy the materiality standard of *Agurs*. Brower's involvement in making terrorist devices in no way contradicted his testimony regarding the 1977 explosives shipment in which petitioner was involved. Moreover, we note that petitioner should have been—and very likely was—aware of the very information that had been redacted from the transcript of Brower's grand jury testimony. Prior to petitioner's trial, Brower had testified at co-defendant Wilson's trial regarding his and Wilson's involvement in the construction of terrorist devices.[3] It is therefore clear that there was no *Brady* violation because petitioner was independently aware of the redacted information. See *United States* v. *LeRoy*, 687 F.2d 610, 619 (2d Cir. 1982), cert. denied, 459 U.S. 1174 (1983); *United States* v. *Brown*, 628 F.2d 471, 473 (5th Cir. 1980).

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[3] See our brief in opposition in *Wilson* v. *United States*, No. 84-5411, at 12-13. We are providing petitioner with a copy of our brief in opposition in *Wilson*.

We are advised that petitioner in fact attended Wilson's trial, which preceded his.

2. Petitioner next contends (Pet. 34-46) that he was prejudiced by the failure to disclose Brower's grand jury testimony regarding the construction of terrorist devices because, had he been aware of that evidence, he would not have waived his right to a jury trial. This claim likewise does not warrant further review.

Petitioner cites two contradictory rationales for his post hoc assessment that he would have been better served by a jury trial than a bench trial. First, he asserts that the trial judge, being aware of the terrorist device testimony as a result of his in camera inspection of the grand jury transcripts, would have harbored "a feeling of utmost disgust and loathing" against Brower and his associates, including petitioner (Pet. 40). Petitioner therefore claims that he would have rejected a bench trial because of the likely bias that the trial judge would have felt toward him (Pet. 42).[4] As his second reason for claiming that he would have preferred a jury trial, petitioner claims that Brower's terrorist device testimony before the grand jury could have been used to impeach Brower's credibility at a jury trial (Pet. 37-38). Thus, while complaining that he should not have been tried by a judge who was aware of the terrorist device testimony, petitioner simultaneously avows that he would have placed the same information before a jury if it had been the trier of fact.

Even putting aside the contradictory nature of petitioner's contentions, his claim lacks merit. First, the impeachment value of the terrorist device evi-

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[4] Since petitioner was Brower's attorney (see Pet. 6-7), there is no reason to believe that a jury would have been any less inclined than the district court to associate petitioner with Brower.

dence simply does not rise to the level of materiality necessary to warrant reversal. *United States* v. *Agurs*, 427 U.S. at 109-112; *United States* v. *Mesa*, 660 F.2d at 1076. Second, as noted above, the terrorist device evidence had been part of Brower's testimony before the same district judge at the earlier trial of Wilson, petitioner's co-defendant. Consequently, petitioner cannot now claim that he was unaware of this information when he either knew of it at the time of trial or could have discovered it with minimal diligence. See, *e.g.*, *United States* v. *Conforte*, 624 F.2d 869, 879 (9th Cir.), cert. denied, 449 U.S. 1012 (1980); *United States* v. *Cervantes*, 542 F.2d 773, 779 (9th Cir. 1976). In these circumstances, there is no basis for finding that petitioner's waiver of a jury trial was anything but voluntary. *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 237-238 (1973).[6]

3. Petitioner also argues (Pet. 46-53) that he was prejudiced in the prosecution of his appeal by the denial of his motion for access to sealed portions

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[6] We also note that the district judge's awareness of the terrorist device evidence did not amount to impermissible personal bias arising from extra-judicial sources that would have required the trial judge to recuse himself. See, *e.g.*, *United States* v. *Kelley*, 712 F.2d 884, 889-890 (1st Cir. 1983); *United States* v. *Porter*, 701 F.2d 1158, 1166 (6th Cir. 1983), cert. denied, No. 83-4 (Dec. 5, 1983); *United States* v. *Baskes*, 687 F.2d 165, 171 (7th Cir. 1981). Moreover, petitioner has failed to make any showing that the trial judge demonstrated any actual bias against him in the course of the proceedings. See, *e.g.*, *United States* v. *Hines*, 696 F.2d 722, 729 (10th Cir. 1982); *United States* v. *Miranne*, 688 F.2d 980, 985 (5th Cir. 1982), cert. denied, 459 U.S. 1109 (1983). Indeed, the probationary sentence imposed by the district judge (Pet. App. A2-A3) would indicate that no such bias existed.

of the record on appeal in the case of his severed co-defendant, Edwin Wilson. The decision below is correct, however, and clearly does not warrant further review.

Petitioner sought at trial to establish a good faith defense similar to that proffered by Wilson at his earlier trial. In that case, Wilson failed to provide sufficient evidence to warrant a jury instruction on a good faith defense, and the trial judge declined to give such an instruction. Much of Wilson's appeal centered on his "CIA defense" and the district court's refusal to give the good faith instruction Wilson had requested. *United States* v. *Wilson*, 732 F.2d 404 (5th Cir. 1984), cert. pending, No. 84-5411. In his own appeal, petitioner sought access to classified information contained in the record on appeal in *Wilson*. Petitioner argues that if he had had access to these materials, relating to Wilson's "CIA defense," he would have been better able to argue in his own appeal that he believed in good faith that the explosives shipment had been authorized by the National Security Council.

We note at the outset that petitioner's good faith defense was resolved against him at trial. Petitioner claimed to have been told by Brower that the National Security Council had authorized the explosives shipment. Brower denied petitioner's allegation, and the district court resolved the credibility dispute against petitioner. That determination presents no issue warranting further review.

Nor is there any basis for petitioner's claim of a right of access to sealed portions of the record on appeal in *Wilson*. Petitioner might have sought access to such material for presentation at his own trial, but he did not. And, of course, his appeal was confined to the record of the proceedings against him in the

district court. Fed. R. App. P. 10(a). It was not open to petitioner to attempt to relitigate his trial by lodging new evidentiary material with the court of appeals. See, *e.g.*, *United States* v. *Anderson*, 481 F.2d 685, 702 n.19 (4th Cir. 1973), aff'd, 417 U.S. 211 (1974).

4. Finally, petitioner contends (Pet. 54-64) that the district court improperly relied on an affidavit to discredit petitioner's good faith defense. The short answer to this claim is that the district court used the affidavit only in determining whether an exhibit petitioner sought to introduce at trial was classified by any national security agency. The court thereafter allowed petitioner to present his good-faith defense, and the government did not use the affidavit to counter petitioner's defense.

Pursuant to the Classified Information Procedures Act (CIPA), 18 U.S.C. App. III, petitioner was required to give pretrial notice of his intent to disclose classified information at trial. Petitioner therefore provided the district court with the medallion that Brower allegedly had given him as a "National Security identification piece" (Pet. App. C2). Brower purportedly had received the coin from Wilson and had told petitioner that if he were stopped by BATF or Customs officials, he should display the medallion and they would "go away" (*id.* at C1). The district court submitted the medallion to a Department of Justice Security Officer to determine whether it was in fact a classified item subject to the procedures governing the introduction of classified information mandated by CIPA.

The Security Officer, D. Jerry Rubino, submitted an affidavit in response to the district court's request (Pet. App. G). Rubino stated that he had contacted the two agencies mentioned by petitioner, BATF and

Customs, as well as the Secret Service and the CIA. Based on the information provided by these agencies, Rubino reported to the court that the coin was not a classified national security item and that, in all likelihood, the coin had been minted by a now-defunct company in Utah (*id.* at G3). The effect of the Rubino affidavit, therefore, was to permit petitioner to present his "good faith" defense at trial freed of the procedural restrictions imposed by CIPA.

Petitioner nevertheless complains (Pet. 58) that the Rubino affidavit did not meet the requirements of Fed. R. Evid. 803(10) for the admission of an affidavit attesting to the lack of an entry in a particular set of public records. Petitioner's argument misses the point. The government never offered the Rubino affidavit as evidence at trial. Instead, it was submitted solely for the purpose of assisting the district court in making a preliminary determination with respect to the applicability of CIPA's procedures for handling classified information. The district court is not bound by the rules of evidence in making such preliminary rulings, and reliance on hearsay is entirely appropriate. Fed. R. Evid. 104(a); *United States* v. *Matlock*, 415 U.S. 164, 175 (1974); *United States* v. *Whitten*, 706 F.2d 1000, 1019 (9th Cir. 1983), cert. denied, No. 83-864 (Mar. 19, 1984); *United States* v. *Merritt*, 695 F.2d 1263, 1269-1271 (10th Cir. 1982), cert. denied, 461 U.S. 916 (1983); *United States* v. *Killebrew*, 594 F.2d 1103, 1105 (6th Cir.), cert. denied, 442 U.S. 933 (1979).

Although the government did not offer the Rubino affidavit as evidence at trial, petitioner did (4 R. 101, Def. Exh. 28). Thus, the most that can be said to have occurred is that the district court permitted petitioner to introduce hearsay evidence against himself.

Clearly, this incident did not violate petitioner's confrontation rights.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 84-269

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

EDWARD J. BLOOM,
Petitioner,

v.

UNITED STATES OF AMERICA,

ON PETITION FOR WRIT OF CERTORARI TO THE UNITED STATE COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S RESPONSE TO BRIEF OF THE UNITED STATES IN OPPOSITION TO PETITION

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Petitioner will comment on the Government's "Statement" appearing on Pages 2-3 of its Brief in Opposition and will then respond to the points raised in the Government's Argument in

the same numerical order as these points are raised in the Brief.

COMMENT ON GOVERNMENT STATEMENT

(Pages 2 and 3)

The Government Brief states that petitioner travelled to Switzerland to pick up the money to pay for the explosives, and then hand carried the payments to each of the three manufacturers from whom Brower had arranged to obtain the explosives. (Page 2) These statements are not entirely supported by the record. At Brower's request, Petitioner obtained cash money from Brower's Swiss Bank Account. The record is not clear as to the disposition of this money. It is clear, however, that petitioner using Brower's money and at Brower's direction, paid for some, but not all, of the explosives purchased by Brower. In any event, these

acts by petitioner were each and all legal as Brower was (as petitioner knew) duly authorized by the United States to buy, sell, manufacture, import and export explosives.

On pages 2 and 3 the Government Brief states that petitioner "arranged" for a Chartered flight to transport the explosives to Libya but did not disclose to the Charter's agent that the cargo would be explosives. This statement is not supported by the record. Petitioner, at Brower's request and using Brower's money, paid for the airplane but the arrangements for the plane and lease of the chartered plane was between the airline and the freight forworder, who arranged for the flight.

On page 3 the Government Brief states that Brower paid petitioner

$ 10,000 for his efforts in connection with the explosives. Once again the Government relies on isolated portions of the transcript and omits references to the full transcript. Petitioner had been, as an attorney, paid a monthly retainer by Brower for seven or eight years prior to the shipment in question. Brower testified that he paid petitioner the $ 10,000 as a bonus for all of the good work petitioner had done for him.

On page 3 the Government, again relying upon isolated portions of the transcript, said that Brower testified that it was later, possibly in 1982, when petitioner asked him for the medallion. In fact petitioner had returned the medallion which Brower originally gave him as a National Security Counsel Identification piece to Brower and, after this case arose against petitioner, he

asked Brower for it, probably in 1982, to aid his defense herein. Brower testified that he had originally given the medallion to petitioner as an identification piece within his own organization before he testified to the request in about 1982.

1. The Government's Brief (page 4) correctly states that witnesses Douglas Smith and Peggy Brower were called by the defense, not by the Government. Peggy Brower was and is the wife of Jerome Brower and was his office manager at all relevant times. Douglas Smith was Brower's right hand man in Brower's business operations at all times here relevant.

In the suppressed portions of Smith's grand jury transcript he testified to working with Brower concerning building in Libya terrorist devices such as letter

bombs, gift jars of tea which would explode when opened and other secret booby trap devices. In the suppressed portions of Smith's testimony, he also testified concerning his involvement in the subject shipment. For example he questioned Brower if the purchaser of the subject shipment had the necessary export permits and Brower replied "They are working on it at the present time." (P. 7, Texas Grand Jury testimony, Sept. 11, 1982; Wm. testimony Sept. 13, 1980). Whereas, Brower had represented to appellant that the permits had been obtained.

Peggy Brower testified (150-153) in this case that she had no knowledge in 1977 of what Brower was doing with either Wilson, or his company Consultants International or Libya. In suppressed portions of Brower's grand jury testimony he testified to his wife (Peggy) going with him

from California to Washington, D.C., then to Wilson's farm in Virginia and from there to London, England with Mr. & Mrs. Wilson. In the suppressed grand jury testimony of Peggy Brower she admitted knowledge of Brower's Libyan activities in 1977.

At and prior to his trial, petitioner did not know of the participation of Smith and Peggy Brower in, or their knowledge of, Brower's involvement in the subject shipment and could not, therefore, question them concerning same. The government should have supplied petitioner with the suppressed portions of the grand jury testimony of Smith and Peggy Brower which related directly to the subject shipment. Petitioner could then question them about these matters and their falsehoods relating to same and used the material elicited from them to cross-examine

Brower, the only witness against petitioner on his crucial good faith defense and perhaps elicit exculpatory material.

Petitioner asserts that suppression of the testimony of Brower, Smith and Peggy Brower relating to Brower's prior 1976 shipment also unconstitutionally deprived petitioner of the opportunity to develop exculpatory material.

The Government contends (page 5) that the redacted testimony was not directly exculpatory; and that petitioner argues that he would have used it on cross-examinaton to impeach Brower's credibility. The Government then asserts that to be entitled to this testimony, petitioner must show that the suppressed evidence would have created "a reasonable" doubt that did not otherwise exist,citing United States v. Agurs, 427 U.S. 97, 109-

112 and United States v. Mesa, 660 F. 2d. 1070, 1076. Both Agurs and Mesa involved motions for new trial and the standard applicable to defendant's assertion of newly discovered evidence.

Here we are dealing with violations of petitioner's Sixth and Fifth Amendment rights crucial to a fair trial and petitioner's contention that these violations of his constitutional right to a fair trial vitiated the entire proceeding.

In Agurs, supra, the Court dealt at length with Brady v. Maryland, 373, U.S. 83, stating that Brady applies in three quite different situations, each involving discovery after tial, of information known to the prosecution but unknown to the defense. The Court in Agurs refers to Mooney v. Holahan, 294 U.S. 103 as illustrating the first situation in which the prosecution's case includes perjured

testimony and the prosecution knew or should have known of the perjury. A prosecution so obtained is held to be extended to cases like this one where the prosecution knew of, and suppressed, perjury of Brower, Smith and Peggy Brower in grand jury transcripts in matters relevant to this case. Peitioner had made specific requests for all grand jury testimony. This suppression unconstitutionally denied petitioner the opportunity, to use the suppressed material to develop evidence exculpatory to him in violation of his rights to due process.

Suppose for example, petitioner had been furnished this suppressed grand jury testimony of Smith and Peggy Brower and had questioned them concerning same and they, or one of them, testified that Brower told the witness that the operation was one of the National Security

Council, or a clandestine one, or one which was illegal.

In Curry v. Secretary of the Army, 595 F. 2d. 573 (D.C. Cir. 1979) the Court said on page 876 "...a showing of actual perjudice is not a pre-requisite to finding a conviction constitutionally invalid on due process grounds...and that if a procedure involves a possibility that prejudice may result...it will be struck down and the conviction reversed..." Citing Estes v. Texas, 381 U.S. 532, 542-43.

On page 5 of the Reply the Government states that there was no Brady violation because petitioner was independently aware of the redacted transcript information and in the footnote on that page it is said that "We are advised that petitioner in fact attended Wilson's trial, which preceded his." It is true

that petitioner attended a portion of the Wilson trial and testified as a witness in that trial. Petitioner's attendance at portions of the Wilson trial was not sufficient to apprise him of the suppressed material.

Petitioner was not permitted to see the unredacted grand jury transcripts until after his trial and conviction when he was permitted to see some in aid of his appeal and learned for the first time of the suppressions of the tran scripts. Not knowing the precise contents of the redacted material, petitioner was not in a position to move the trial court for what he did not know existed, let alone make a showing of "particularized need" for same at or in advance of his trial.

2. The crux of petitioner's argument concerning the waiver of jury is

that it involves the fact that Brower was the only witness to testify against petitioner on the issue of his good faith (National Security Council) defense based upon Brower's giving petitioner the medallion and saying it was a National Security Council identification piece. Bearing in mind that the testimony of a single witness to criminality is closely scrutinized and wide cross-examination of such witness is allowed, petitioner would never have waived jury if he had known of the existence of the suppressed grand jury testimony of Brower, his wife and Smith directly relating to this case. The suppressed material contained perjury and changing of stories before various grand juries. The suppression of this grand jury testimony deprived petitioner of opportunity to cross-examine Brower

about many of his lies and terrorist activities.

Further, the suppression of the grand jury testimony of Smith and Peggy Brower, deprived Petitioner of the opportunity to question them about many relevant things, especially their knowledge or information, if any, about the operation being an operation of the National Security.

This suppressed material contained explosive ammunition for cross-examination before a jury and if petitioner had known of some at the time of his jury waiver, he would not have waived jury.

The Government states (page 7) that there is no basis for finding that petitioner's waiver of a jury trial was anything but voluntary. It was not voluntary because the waiver of jury trial was induced by representations of the court

and the prosecutor that he had been furnished all relevant grand jury transcripts, which representations were erroneous; in reliance upon these representations, petitioner waived jury unaware of the suppressions of the grand jury transcripts. If petitioner had been furnished these suppressed portions of the transcripts, he would not have waived jury trial.

3. Petitioner believes that the Third Question presented in the Petition, and the Government's Reply thereto (its Brief, pages 7-9) are moot since this court denied Wilson's Petition for Certorari, No. 84-5411. This denial was after the Petition and the Reply were filed filed. Believing the matter to be moot, petitioner will make no response to the material on pages 7-9 of the Brief relating to this question.

4. The Reply Brief (pp. 9-11) of the United States apparently does not understand the thrust of petitioner's argument against the Rubino affidavit. On page 9 it is stated that Brower "had told petitioner that if he were stopped by BATF or Customs officials, he should display the medallion and they would 'go away'" (referring to Pet. App. C-1) and that the Rubino affidavit stated that he had contacted the two agencies mentioned by petitioner, BATF and Customs, as well as the C.I.A. Petitioner App. C1 is a copy of petitioner's handwritten letter (Pet. App. C) which he delivered to Judge Sterling in compliance with Classified Information Procedures Act (CIPA), 18 U.S.C. App. III), Pet. App. C-1 clearly states that Brower told petitioner that

if he were stopped by BATF or Customs "or any other federal official" to show the medallion and the official would go away. Petitioner's App. C, as well as petitioner's testimony concerning same, clearly refer to National Security Council Identification piece, not to BATF, Customs, CIA, or any other agency except National Security Council.

Petitioner's letter (App. C) to Judge Sterling was followed by filing formal Notice of Intent to disclose Classified information as required by CIPA.

As stated on page 60 of the Petition the Government should have filed an affidavit from a qualified affiant or produced a competent witness to testify whether or not the records of the National Security Council reveal anything about the medallion and testify that the

shipment of explosives was or was not authorized by that council or its representative. When assertion is made that material is classified and the government alone is in possession of all evidence material to the inquiry, it should be required to produce the evidence. Its failure to do so violates petitioner's Sixth Amendment right of confrontation, cross-examination, compulsory process and Fifth Amendment rights to due process and a fair trial.

Petitioner introduced the Rubino affdavit for the purpose of showing that, since it does not mention the National Security Council (the only relevant agency), the affidavit shows by implication that the medallion was not shown to that agency.

The failure of the Government to produce competent evidence as to whether

or not the medallion was a National Security Identification piece, coupled with the suppression of relevant grand jury testimony and petitioner's consequent lack of opportunity to use same to cross-examine Brower and question Smith and Peggy Brower concerning their knowledge, if any, of whether or not the operation was one of the National Security Council, denied petitioner a fair trial.

In United States v. Smith, No. 84-5240, 4th Circuit, filed December 21, 1984, the Court held that CIPA is procedural and does not change the standards for determining relevance and admissibility. The Court further held that in proceedings under 6(a) of CIPA to determine "the use, relevance, or admissibility of classified information." The court is not empowered by either

CIPA or precedent to exclude classified evidence that is relevant to the defense of the accused.

The only evidence against appellant's good faith defense was Brower's denial of the statement he made to petitioner that the medallion was an identification piece of the National Security Council. Whether it was or not was crucial to petitioner's good faith defense. Brower had admitted giving the medallion to Petitioner and testified that it was supposed to be an identification piece within his own organization, This explanation is absurd as petitioner knew all of Brower's people. This explanation was not supported by any of Brower's people. Brower's testimony concerning the medallion was shifty and evasive and was a story concocted by him to escape prosecution if he told the truth.

Brower stood on the witness as an admitted, deliberate felon, terrorist, cheat, perjuror. In addition he faced prison if he told the truth about telling petitioner that the medallion was an Identification piece of the National Security Council. If he admitted saying that, he would admit violating criminal Statutes of the United States. 18 U.S.C. Sec. 701 (Petitioner's App. 1, page 2) makes it a crime to possess a false badge or identification piece of any agency of the United States and 18 U.S.C. Sec. 912 (Petitioner's App. 1, page 3) makes it criminal falsely to pretend to be an officer or employee acting under the authority of the United States or any agency thereof.

It is well settled that a defendant is allowed wide latitude in cross-examing the only witness against him in a

conspiracy case, especially on a crucial issue involving criminality. In United States v. Partin, 493, F. 2d. 750 (1974, 5th Cir.) the Court said at page 760:

> "The Supreme Court has recosnized that where the governments case in a criminal prosecution may stand or fall on the jury's belief or disbelief of one witness, that witness's credibility is subject to close scrutiny..."
> Citing Gordon v. United States, 344 U.S. 414 (1953)

Under Federal Rules fo Evidence 608 (b) "bias of a witness is not a collateral issue and extrinsic evidence is admissible to prove that a witness has a motive to testify falsely". United States v. James, 609 F. 2d. 36, 2nd Cit. 1979 Cert. Den. 445 U.S. 905, quoting from United States v. Harvey, 547 F. 2d. 720, 722 (2nd Cir. 1976). See also United States v. Haggett, 438 F. 2d. 396 (2nd Cir. 1976), Cert. Den. 402 U.S. 946.

Further, Brower's perjury before various grand juries contained in suppressed transcripts may be shown by extrinsic evidence or extracted from the witness on cross examination, subject to the exception for relevancy and self- incrimination. United States v. Varelli, 407, F. 2d. 735, (1969, 7th Cir.), Denial to petitioner of the full transcripts containing this perjury deprived petitioner of a fair trial in denying him the material with which to cross-examine Brower to expose his various lies and changes of stories and to explore his motive in testifying falsely against petitioner. Petitioner should have been allowed wide latitude in cross-examining Brower as the sole witness against him on his good faith defense and under Evidence Rule 608 (b) to show specific instances of Brower's conduct as hearing

on Brower's motive to testify falsely, which motive was fear of prison if he told the truth, thereby admitting his commission of a crime.

As stated in Davis v. Alaska, 415 U.S. 308 (1973) at page 319:

> "Petitioner was thus denied the right of effective cross-examination which 'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it. Brookhart v. Janis, 384 U.S. 1, 3, Smith v. Illinois, 390 U.S. 129, 131 (1968)"

CONCLUSION

The petition for Writ of Certorari should be granted.

Respectfully submitted,

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EDWARD JOHN BLOOM

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
COUNTY OF RIVERSIDE) ss.

I, the undersigned, say: I am a resident of the County of Riverside; over the age of 18 years and not a party to the within action or proceeding; that my address is 2611 Linden Way # C, Palm Springs, California 92264.

That on the 9th day of January, 1985, I served the within paper PETITIONER'S RESPONSE TO BRIEF OF THE UNITED STATES IN OPPOSITION TO PETITION by depositing said 2 copies enclosed in a sealed envelope with postage hereon fully prepaid, in the United States Postal Service mail box at the City of Los Angeles, California, addressed as follows:

Rex E. Lee
Solicitor General
Stephen S. Tratt, Assistant Attorney Gen.
Francis J. Martin, Attorney
Department of Justice
Washington, D.C. 20530

I declare under penalty of perjury that the the foregoing is true and correct.

Executed on January 9th, 1985 at Los Angeles, California.

M. KNOTT